

1042

R E P O R T S

O F

C A S E S

A D J U D G E D I N T H E

Court of King's Bench

Since the Time of LORD MANSFIELD'S
Coming to preside in it:

By SIR JAMES BURROW.

With T A B L E S

Of the NAMES of the C A S E S,

A N D

Of the M A T T E R contained in them.

V O L U M E the F I F T H:

Beginning with *Easter* Term 10 *Geo.* 3. 1770.

A N D

Ending at *Easter* Term 12 *Geo.* 3. 1772, (exclusive.)

L O N D O N:

Printed by His Majesty's Law-Printers;

For EDWARD BROOKE (Successor to Mr. JOHN WORRALL and
Mr. BARNES TOVEY,) at the *Dove* in *Bell-Yard*, near *Lincoln's-Inn*.

MDCCLXXX.

9



A D V E R T I S E M E N T.

NO SETTLEMENT-Cases are reported in this Volume; nor is any *Abridgement* of them contained in the Table at the End of it.

The Reason of this Omission is, that I have already published them (in a separate Collection in Quarto) as far as *June* 1776; and hope to be able, before next *Michaelmas* Term, to publish a Supplemental Continuation of them.

E R R A T U M——in Vol. 3.

THE Reader is requested to correct the following Error; Which he will find in the third Volume, Page 1510. Where it is said “that a Grant of a next Presentation, or of an “*Advowson*, made *after* the Church is actually fallen vacant, “is a VOID Grant.”

For, though this is true, *so far* as relates to the *fallen Vacancy*; yet the Grant is *good*, as to the *Advowson itself*; (unless it be a corrupt Purchase.) *H. 16 G. 3. C. B. Barrett and Reynell, (Clerk,) v. Glubbs, (Clerk,) and Rolle.*

Also, in the *Table* to that third Volume, Title “*Advowson*,” where the Words at present stand thus—“Grant of an *Advowson*, “or next Presentation, made *after* the Church is actually fallen “vacant, is a VOID Grant,”—He is requested to *add* the following restrictive Words—“*Quoad the actual Vacancy*; though not “*quoad* the *ADVOWSON itself*.”

Lately published (in QUARTO)

A

S E R I E S

OF THE

D E C I S I O N S

OF

The COURT of King's Bench

UPON

SETTLEMENT-CASES;

From March 1732, to June 1776.

With proper TABLES:

By SIR JAMES BURROW.

And soon will be published a further Continuation of them.

Sold by EDWARD BROOKE.

A *Chronological* TABLE of the NAMES of
the CASES contained in this Volume,
according to the Order of their Determi-
nation.

Easter Term 1770, 10 *Geo.* 3.

HART, Assignee of the Sheriff
of Cornwall, v. Weston, 2586
Idem v. Hingeston *ibid.*
Nightingal et al', Assignees of Met-
tivier, a Bankrupt, v. Devisme,
2589
Rex v. Inhabitants of the West Rid-
ing of Yorkshire, 2594
Rex v. Grimes, Capital Burgeis of
Yarmouth in the Isle of *Wight*, 2598
Kimber, qui tam &c, v. Blanchard,
2602
Fairclaim, on the Demise of James
Empson, v. William Shackleton,
2604
Roe, on the Demise of Betty Ben-
dale, v. Summerfet, Mary Bendale
Widow, and Mary Bendale the
younger, 2608
Denn, on the Demise of William
Creswick, v. Joseph Hobson and
seven Others 2609
Rice v. Shute, 2611
Thomas Wills and Ann his Wife
and Others v. Henry Palmer Esq;
and Others, 2615
Quantock and Others, Assignees of
George England, a Bankrupt, v.
Robert England, 2628

Martyn v. Podger and Others, 2631
Rex v. Inhabitants of Witney, 2634

Trinity Term 1770, 10 *Geo.* 3.

Roe, on the several Demises of Tho-
mas Urry and Elizabeth Haldane,
v. Harvey, 2638
Burrough, Widow, v. Skinner, 2639
Rex v. Thomas Dunn, 2640

Michaelmas Term 1770,
11 *Geo.* 3.

Ann Bigby, Widow, v. Matthew Ken-
nedy and Patrick Kennedy, 2643
Tinkler v. Poole and Another, 2657
Hopwood v. Adams, 2660
Bush v. Pates, 2660
Rex v. Woodfall, 2661
Blesard v. Hirst and Another, 2670
Connor v. West, 2672
Stonelake, who &c. v. Babb, 2673
Rex v. Bartholomew Winship and
William Gunwell, 2677
Davis and Jordan v. James, 2680
Rex v. May et al' } Freeman of Sal-
Rex v. Little } tash, 2681
Harrison and Another, Assignees of
the Sheriff, v. Davies and Another,
2683
Rex

A Chronological Table, &c.

Rex v. Frances York and Jane Field-
ing, 2684
Rex v. Almon, 2686
Crooke and Another, Executors, v.
Davis, 2690

Hilary Term 1771, 11 Geo. 3.

Hutchinson, Executrix, v. Brice, 2692
Burchall v. Ballamy, 2693
Wilkinson v. Colley, 2694
Purdy v. Stacey, 2698
Rex v. Inhabitants of Great Brough-
ton, 2700

Easter Term 1771, 11 Geo. 3.

White and his Wife, and Presgrave
and Others, v. Barber, Presgrave
and Others, 2703
Stock, One &c, v. Harris, Deputy-
Postmaster of Gloucester, 2709
Barnes v. Foley, Postmaster of Bath,
2711
Henry Law, who &c, v. James Ib-
betson, D. D. 2722
Martin v. Townsend and Sawbridge,
2725
Raban v. Plaistow, 2726
French v. Backhouse, }
French v. Foulston, } 2727
Short v. John Coffin, Executor of
Benjamin Coffin, 2730

Trinity Term 1771, 11 Geo. 3.

Hamilton and Smyth v. Davis, 2732
Rex v. College of Physicians, 2740
William Sellon, Clerk, v. Roger Par-
ry, Clerk, 2762
Vaughan, on Demise of Atkins Esq;
v. Atkins, Widow, 2764
Rex v. Ferdinand de Mierre, 2787
Hill and Another v. Goodchild,
2790
Rex v. John Taylor, 2793
Elizabeth Smith, Widow, v. Eudem,
2798
Earl of March v. Pigot, 2802

Michaelmas Term 1771, 12 Geo. 3.

Rudsdell, v. Rudsell, 2806
O'Neil v. Marson, 2812
Seymour and Others v. Lord Courte-
nay and Others, 2814

Hilary Term 1772, 12 Geo. 3.

Kershaw v. Cartwright and Pearce,
Bail of Green, 2819
Rex v. Agar and O'Meara, 2820
Ross v. Johnson and Dowson, 2825
Beck on the Demise of Fry v. Phil-
lips, 2827
Mace, qui tam &c, v. Lovett 2833

An *Alphabetical* T A B L E of the N A M E S
of the C A S E S contained in this Volume.

B.

B Arnes v. Foley, Postmaster of
Bath, 2711
Beck on the Demise of Fry, v.
Philips, 2827
Bigby, Widow, v. Matthew Ken-
nedy and Patrick Kennedy, 2643
Blesard v. Hirst and Another, 2670
Burchall v. Ballamy, 2693
Burrough, Widow, v. Skinner, 2639
Bush v. Bates, 2660

C.

Connor v. West, 2672
Crooke and Another, Executors,
v. Davis, 2690

D.

Davis and Jordan v. James, 2680
Denn, on the Demise of William
Creswick, v. Joseph Hobson and
seven others, 2609

E.

Earl of March v. Pigot, 2802

F.

Fairclaim, on the Demise of Emp-
son, v. Shackleton, 2604
French v. Backhouse, }
French v. Foulston, } 2727

H.

Hamilton and Smyth v. Davis, 2732
Harrison and Another, Assignees of
the Sheriff, v. Davies and Ano-
ther, 2683
Hart, Assignee of the Sheriff of
Cornwall, v. Weston. } 2586
Idem v. Hingeston, }
Hill and Another, v. Goodchild,
2790
Hopwood v. Adams, 2660
Hutchinson, Executrix, v. Brice,
2692

K.

Kershaw v. Cartwright and Pearce,
Bail of Green, 2819
Kimber, qui tam, &c. v. Blan-
chard, 2602

L.

Law, qui tam, &c. v. Ibbetson,
D. D. 2722

M.

Mace, qui tam, &c, v. Lovett, 2833
March Earl of, v. Pigot 2802
Martin v. Townsend and Sawbridge,
2725
Martyn v. Podger and Others, 2631

N.

An Alphabetical Table, &c.

N.		Rex v. Woodfall,	2661
		Rice v. Shute,	2611
Nightingal and Others, Assignees of Mettivier, a Bankrupt, v. De- visine,	2589	Roe, on the Demise of Betty Ben- dale, v. Summerfet, Mary Ben- dale, and Mary Bendale the Youn- ger,	2608
O.		Roe, on the several Demises of Thomas Urry and Elizabeth Hal- dane, v. Harvey,	2638
O'Neil v. Marson,	2812	Ross v. Johnson and Dowson,	2825
P.		Rudsdell v. Rudsdell,	2806
Purdy v. Stacey	2698	S.	
Q.		Sellon, Clerk, v. Roger Parry, Clerk,	2762
Quantock and Others, Assignees of George England, a Bankrupt, v. Robert England,	2628	Seymour and others v. Lord Courte- nay and Others,	2814
R.		Short v. John Coffin, Executor of Benjamin Coffin,	2730
Raban v. Plaistow,	2726	Smith, Widow, v. John Taylor,	2798
Rex v. Agar and O'Meara,	2820	Stock, one &c. v. Harris, Deputy- Postmaster of Gloucester,	2709
— v. Almon,	2686	Stonelake, who, &c. v. Babb,	2673
— v. College of Physicians,	2740	T.	
— v. Dunn,	2640		
— v. Grimes, Capital Burgefs of Yarmouth in the Isle of Wight,	2598	Tinkler v. Poole and Another,	2657
— v. Inhabitants of Great Broughton,	2700	V.	
— West Riding of Yorkshire,	2594		
— Witney,	2634	Vaughan, on the Demise of Atkins, Esq; v. Atkins, Widow,	2764
— v. Ferdinand de Mierre,	287	W.	
— v. Little, May and others, Free- men of Saltash,	2681		
— v. John Taylor,	2793	White and his Wife, and Presgrave and Others v. Barber, Presgrave and Others,	2703
— v. Winship and Gunwell, Overseers of Corbridge,	2677	Wilkinson v. Colley,	2694
— v. Frances York, and Jane Fielding,	2684	Wills and his Wife, and Others, v. Henry Palmer Esq; and Others,	2615

Easter Term 1770.

10 Geo. 3. B. R.

Memorandum—During the last Vacation, several Alterations happened on the Bench, and at the Bar.

MR. Justice CLIVE resigned his Judgeship of the Common Pleas; and Mr. Justice YATES took it.

Mr. BLACKSTONE, Solicitor General to the QUEEN, Vinerian Professor of Law, and Author of the Commentaries on the Laws of *England*, succeeded Mr. Justice YATES in this Court, and was knighted.

Mr. AMBLER, one of his Majesty's Counsel learned in the Law, succeeded Sir WILLIAM BLACKSTONE, as Solicitor General to the QUEEN.

Mr. HUSSEY, having (towards the End of last Term) resigned his Offices of Attorney General to the QUEEN, Counsel to the Admiralty, and Auditor of *Greenwich Hospital*; he was succeeded in the first by JOHN MORTON ESQ; of the *Inner-Temple*, Chief Justice of *Chester*; in the Second, by FRANCIS CUST ESQ; of the *Middle-Temple*, Brother to the late Speaker of the House of *Commons*; and in the Third, by EDWARD THURLOW ESQ; of the *Inner-Temple*, one of his Majesty's Counsel learned in the Law.

And RICHARD JACKSON ESQ; of the *Inner-Temple*, was appointed one of his Majesty's Counsel learned in the Law, and Counsel to the Board of Trade, which had been vacant from the Death of Sir MATTHEW LAMB to this Time.

Mr. THURLOW was also appointed his Majesty's Solicitor General, in the Room of Mr. DUNNING, who resigned that Office.

Mr. DUNNING, late Solicitor General, appeared on the Outside of the Bar, in the common ordinary Bar-Gown.

Wednesday, 2d May 1770.
(the first Day of this Term.) LORD MANSFIELD, after Mr. *Dunning* had made his first Motion, addressed Himself to Him, and declared, that in Consideration of the Office he had holden, and his high Rank in Business, he intended for the future, (and thought he should thereby injure no Gentleman at the Bar,) to call to Him next after the King's Counsel and Serjeants, and the Recorder of London.

Mr. CALDECOTT and Mr. COXE, the two Senior Utter-Barristers present, very readily assented to it; and said they had thought of proposing the same thing Themselves.

Hart, Assignee of the Sheriff of Cornwall, *versus* Weston, Esq; *Idem versus* Hingeston.

Monday 7th
May 1770.

THIS was an Action of Debt upon a Bail-Bond, brought by the Plaintiff as Assignee of the Sheriff of *Cornwall*. The Plaintiff declared that after the first Day of *Trinity* Term 1706, viz. on the 23d Day of *February* 1769, the Plaintiff prosecuted out of the Court of our Lord the King before the King Himself at *Westminster*, a Writ of *Latitat* directed to the Sheriff of *Cornwall*; and so proceeded, and set out the Writ, the Delivery of it to the Sheriff, the Warrant, the Arrest, the giving the Bail-Bond by the Defendants, and the Assignment of it to the Plaintiff. The Defendant pleaded "*Nil debet*" The Plaintiff demurred to his Plea.

Mr. MANSFIELD, on Behalf of the Defendants, objected to this Writ, it being stated by the Declaration to have been sued out of this Court, *then sitting*, on the 23d of *February*; which is impossible: For, the Court could not sit out of Term.

He cited the Case of *Estwick*, Assignee of the Sheriff of *Middlesex*, v. *Cooke*, in 2 *Ld. Raym.* 1557, and *Fitz. Gib.* 66. S. C. which he said was precisely in Point. That was (as this is,) an Action of Debt upon a Bail-Bond; the Plaintiff declared with a *Videlicet* "on the 18th of *July*," which was *after Trinity* Term: And it was agreed to be bad.

Mr. ASHHURST, on Behalf of the Plaintiff, said, this Objection being Matter of *Form*, it can not be taken Advantage of upon a *general* Demurrer: It ought to have been *assigned as Cause*, upon a *special* Demurrer.

Besides, it is only an *Irregularity*: It might have been *waved by an Appearance*.

Therefore the *Bail* shall not take Advantage of it.

By the *Practice* of the Court, a Writ *may* be sued out in Vacation; though it must bear *Teste* within the Term.

In the Case of * Johnson and Another, Assignees v. Smith, Widow, a *Latitat* issued in Vacation: and it was holden "that the *Teste* of a *Latitat* is not conclusive as to the Time of suing it out:" And here it is alledged *as a Fact*, "that the Writ did issue in the Vacation." * V. ante, Vol. 2 pa. 950.

He disputed the Case in 2 *Ld. Raym.* and *Fitz. Gibbon*, and observed that the Time of suing it out appeared only under a *Videlicet*.

Mr. MANSFIELD alledged that Case to be directly in Point.

This Writ issuing in Vacation, and described and set forth *as tested* in Vacation, is *void*; and consequently, all that followed upon it. It must be taken to *issue*, when it was *tested*; unless something in particular is introduced into the Record.

LORD MANSFIELD—We'll look into the Case in LORD RAYMOND. It was *then* the prevailing Opinion, "that it *could not* be *averred* that the Writ issued on a Day different from the *Teste* of it."

CUR ADVIS'.

HIS LORDSHIP now declared the Opinion of the Court; having first stated the Pleadings and the Case of *Estwick v. Cooke*, cited by Mr. MANSFIELD. He then proceeded as follows—

We were inclined to over-rule that Case, if the present Case had been more like it, than it is.

But the present Case does not say when the Writ bears *Date*: It does not mention the *Teste* of it at all.

The

The Case cited had these *further* Words—"eâdem Curia apud "Westmonasterium" adtunc tentâ existente." The Defendant demurred to the Declaration; and it was held ill; because it was not according to the Truth of the Fact: For, it could not, on the 18th of July, be sued out of the Court of King's Bench then sitting at Westminster. This is the Ground of the Opinion of the Court.

Mr. Reeve, who was Counsel for the Plaintiff in that Case, cited a strong Case * to prove "that a Writ *may* be sued out in Vacation-time." But the Court took it up, and said "that the Writ could not be sued out of the Court of King's Bench then sitting at Westminster, when the Court did not, nor could fit out of Term."

* *Walburgh v. Saltonstall*, Sir T. Jones 149. 1 Ventr. 362. V. ante, Vol. 2. p. 964.

The present Case does not say a Word about the *Teste*: It only alledges "that the Plaintiff *prosecuted* the Writ on the 23d of February." And the *Truth of the Fact* is admitted by the Demurrer. Therefore as this is an odious catching Objection, and not to be by any means favoured; Nothing hinders Us from taking it to be true, "that this was *in Fact* sued out upon the Day on which the Plaintiff has alledged it to have been prosecuted."

† V. ante, pa. 967.

It would be void, † if it bore *Teste* upon a Day out of Term: But it does not here appear, upon *what* Day it bore *Teste*.

The Justice of the Case is extremely plain: And an Objection that tends manifestly to obstruct that Justice, is intitled to no Favour.

Mr. MANSFIELD—The Words of the Declaration are—"out of the Court of the said Lord the King, before the King Himself at Westminster."

Cur.—That is only the *Form of the Writ*: It is the *Stile* of the Court. It does not import that the Court was *actually then sitting* at Westminster.

Mr. Justice WILLES observed that this comes on now upon a sham dilatory Plea, whereas the Case cited was upon a Demurrer to the Declaration.

Lord MANSFIELD—It is making the Practice of the Court Chicane, and an Elusion of Justice, instead of being a Method of

of Coming at Right. I wish Gentleman would tell their Clients, that Objections of this Sort ought not and can not prevail.

JUDGMENT for the PLAINTIFF.

Nightingal et al., Assignees of Mettavier, a Bankrupt, *versus* Devisme. Tuesday 8th
May 1770.

THIS was an Action of Assumpsit, brought by the Plaintiffs as Assignees of the Effects of *Paul Mettavier*, a Bankrupt, against the Defendant.

The Declaration contained three Counts—1st. An *Indebitatus Assumpsit*, for 2000 *l.* for Money lent and advanced by the Plaintiffs, as Assignees, to the Defendant, at his Request; 2d. *Indebitatus Assumpsit*, for 2000 *l.* for Money had and received by the Defendant, to the Use of the Plaintiff, as Assignees; 3d. *Indebitatus Assumpsit*, for 2000 *l.* for Money paid laid out and expended by the Plaintiffs, as Assignees, for the Defendant, at his Request: To the Plaintiff's Damage, of 2000 *l.*

To which Declaration, the Defendant pleaded "*Non assumpsit*:" And thereupon Issue was joined.

The Cause was tried at *Guildhall*, after *Michaelmas* Term last, before *Ld. Mansfield*: When a Verdict was given for the Plaintiffs, with 1170 *l.* Damages, and 40 *s.* Costs; subject to the Opinion of this Court on the following Case.

CASE. The Bankrupt *Mettavier*, being a Trader, committed an Act of Bankruptcy upon the 12th of *April* 1769: And a Commission of Bankruptcy issued against him, at the Petition of a Creditor for 100 *l.* and upwards; And his Effects were duly assigned to the Plaintiffs.

On the 17th of *April*, *Mettavier* transferred to the Defendant *Devisme* 500 *l.* *East India* Stock; which 500 *l.* *East India* Stock had been transferred from the Defendant *Devisme* to the said Bankrupt *Mettavier* upon the 5th of *October* preceding, and for which the said Bankrupt *Mettavier* had given the Defendant a Note for 1370 *l.*: Which Transaction was, in the Manner stated in the Defendant's Deposition herein after set forth, taken under the said Commission. "*William Devisme*,
" of *Lotbury London* Merchant; being sworn and examined
" on the Day and Year and at the Place first above written,
VOL. V. C " upon

“ upon his Oath faith, That in the Month (or latter End)
“ of *September* last, *Deponent* applied to *Paul Mettievier*,
“ the Person against whom this present Commission of Bank-
“ ruptcy is awarded and issued; and desired he would become
“ a Proprietor of *India* Stock; (And the Reason why this Exa-
“ minant asked him such Question, was because he thought he
“ could depend on his the said *Paul Mettievier's* voting for Direc-
“ tors at the ensuing Election in *April* then next and now last
“ past:) which the said *Paul Mettievier* agreed to. And this De-
“ ponent faith, that accordingly the Sum of five hundred Pounds
“ *East India* Stock was, on the 4th or 5th of *October* then follow-
“ ing, transferred by *William Fisher*, this Deponent's Broker, to
“ the said *Paul Mettievier*; and for which, the said *Paul Met-*
“ *tievier*, on the 7th Day of said *October* last, gave this Deponent
“ his Promissory Note of Hand for 1370 *l.* or thereabouts, pay-
“ able to this Deponent or Order Six Months after Date, for
“ Value received; and which Note this Deponent kept in his
“ Custody. And this Deponent faith, that he did not, nor
“ did any other Person by his Direction or Knowledge, make
“ any Application to the said *Paul Mettievier* to re-transfer or
“ transfer back the said Stock, until the Day the same was
“ transferred to this Deponent; which was on the 17th Day
“ of *April* last. And this Deponent faith, that a Week or
“ thereabouts before that 17th Day of *April*, this Deponent
“ had heard some Talk of the said *Paul Mettievier's* being
“ in Difficulties, and bad in his Affairs: And faith, that after
“ the said *Paul Mettievier* had transferred the said Stock to this
“ Deponent, this Deponent told the said *Mettievier*, The
“ Note which the said *Paul Mettievier* had given this De-
“ ponent in the Month of *September* (as beforementioned)
“ for the Consideration or Purchase of the said Stock, was
“ at this Deponent's House, and that he might call for it when
“ it suited him; but that the said *Paul Mettievier* did not call
“ for the same. And this Deponent faith, that there was not
“ any particular Discourse between this Deponent and the
“ said *Paul Mettievier* on the Day the said *Paul Mettievier* trans-
“ ferred the said Stock, relative to the said *Paul Mettievier's* Af-
“ fairs; Save that the said *Paul Mettievier*, some short Time after
“ the said Stock was transferred, and before Deponent left
“ him that Day, told this Deponent he should call his Credi-
“ tors together. *William Devisme.*”

The said Note was not redelivered to the said Bankrupt *Mettievier* upon the said 17th of *April*; but now remains in the Possession of the said Defendant.

The

The Defendant paid *no Consideration* for the Transfer of the said five Hundred Pounds, *East India Stock*, on the said 17th of *April*.

THE QUESTION is—Whether the Plaintiffs are intitled to recover in this Action.” And in case the Plaintiffs are not intitled to recover, then a Nonsuit to be entered.

THOMAS WALKER, for Plaintiffs:
JAMES WALLACE, for Defendant.

This Case was argued on *Tuesday 6th February 1770*, by *Serjeant Walker* for the Plaintiffs, and *Mr. Wallace* for the Defendant.

The Serjeant argued that an Action for MONEY *had and received* by the Defendant to the Use of the Plaintiffs, was maintainable in the present Case.

This Stock had been transferred to the Bankrupt for a valuable Consideration, a promissory Note for 1370 *l*; and was the Property of the Bankrupt from the 5th of *October* preceding his Bankruptcy. AFTER his Bankruptcy, he had no Power over it: And at the Time when he retransferred it to the Defendant, the Property was vested in his Assignees; And they had a Right to follow it in the Defendant's Hands. And *this is a proper SPECIES of Action*, for the Plaintiffs to recover in. They could not bring *Trover* nor *Detinue*. It is *no Specific Property*. This Stock must be considered *as MONEY*; like Bank-Bills, or other Things which are current as Money. It is, in all respects, the same as Money. The Mode of transferring it, is only by Delivery. The Transfer is not a Trust; but an absolute Sale. This Action is an equitable Action: And this Court is possessed of every Circumstance; and can give the same Remedy as the Court of Chancery could. The Assignees are clearly intitled to the Money. No Action but this can be maintained by them for it. And the Case of *Moses v. Macferlan* (*v. ante*, Vol. 2. pa. 1005.) is an Authority in Point, “that this Action *may* be maintained for it.”

Mr. Wallace, *contra*, for the Defendant, argued, that this is a *Trust*; and therefore the Remedy is in Equity, and in Equity *only*. This Action is for *Money lent*; and for *Money had and received* to the Use of the Plaintiffs. But this *Stock* is not *Money*; though it may be convertible into Money: And so may
Goods

Goods be. But it does not follow, from its being convertible into Money, "that an Action will lie for it *as* Money."

The Case of *Pickering v. Appleby* in C. B. Mich. 7 G. 1. reported in *Comyns* 354. was cited by Mr. *Wallace*; where it was debated "Whether a Contract for ten Shares of "Stock of the Governor and Company of Copper Mines was "within the Statute of 29 C. 2." [But N. B. the Whole that the Reporter mentions concerning the Determination of that Case, is, "that the Judges being divided in Opinion, it was "adjourned."]

This Action "for Money had and received to the Plaintiff's Use" will only lie for the *Money* itself. And in the Case of *Moses v. Macferlan*, the Court say, * in speaking of the Case of *Dutch v. Warren*, † there cited, "that if the five "Shares in the *Welch* Copper Mines had been of much more "Value, yet the Plaintiff could only have recovered the 260*l.* "10*s.* by this Form of Action."

* *ante*, p. 1012.
† *ante*, 1010.
1011.

A Devise of Money will not carry Stock. Stock is a mere *Chose in Action*. Stock in the Name of the Husband and Wife would survive to the Wife.

Here, the legal Estate is vested in *Devisme*. This Court can't decree a Transfer: That must be done by a Court of *Equity*.

Such an Extention of this Species of Action, as is now contended for, would destroy all Distinction of Actions. An Action for Money had and received to the Plaintiff's Use might be as well brought for a *Horse*, as for Stock. To support this Species of Action, *Money* must have come into the Hands of the Defendant or his Agent. Here, None has.

It stood over, for further Argument.

But Mr. *Dunning*, who was for the Plaintiffs, did not attempt to argue it.

Whereupon LORD MANSFIELD said—This is a *new Species* of Property, arisen within the Compass of a few Years. It is *not Money*. We do not say that an Action *can not be framed*, so as to come at Justice in this Case: But We are All of Opinion that *this* Action "for MONEY had and received to "the Use of the Plaintiffs" will not lie in the present Case, where *no Money was received*.

N. B. As, the Stock was *illegally* transferred by the Bankrupt to the Defendant, might not a Declaration be formed upon the following Plan, or something near to it?

That whereas the said *Paul Mettievier*, before and at the Time of his Bankruptcy, to wit, on the—— day of—— &c, was possessed of 500*l.* *East India* Stock, (giving the Stock its proper Description,) as of his own proper Stock; and being so possessed thereof, he the said *Paul Mettievier* on the said—— day of—— became and was a Bankrupt. Then to state the Issuing of the Commission, and the Assignment of his Effects to the Plaintiffs: Of all which Premises the Defendant afterwards, to wit &c, had Notice. That afterwards, to wit on the—— day of——, the said *Paul Mettievier*, being then a Bankrupt as aforesaid, without the Licence or Privity of the Plaintiffs, and without any just or lawful Cause or Consideration, took upon himself to transfer, and did in fact transfer to the Defendant the aforesaid Stock, which then of Right belonged to the Plaintiffs, as Assignees as aforesaid; And the Defendant then and there accepted thereof: Whereby the Defendant became possessed of the same Stock; and, by reason of the Premises, the Defendant then and there became *liable to ACCOUNT* to the Plaintiffs, as Assignees as aforesaid, for the Value of the said Stock. And being so liable, He the said Defendant afterwards, to wit on the Day and Year last mentioned, at—— undertook and promised the Plaintiffs, as Assignees as aforesaid, *to account to them for the Value thereof*, whenever he should be thereunto afterwards requested: And the Plaintiffs aver that the said Stock was then and there of the Value of—— Pounds. But though the Defendant afterwards, that is to say, on the same Day and Year last mentioned, at—— aforesaid, was requested by the Plaintiffs, so being Assignees as aforesaid, to account to them for the *Value* of the said Stock, Yet the Defendant, not regarding his Promise, &c, &c.

2d. Count, (with the like Introduction as the former,) And that by reason of the Premises, the Defendant became *liable to RETRANSFER* the said Stock to the Plaintiffs, so being Assignees as aforesaid:

And being so liable, He the said Defendant afterwards, to wit &c, undertook and promised the Plaintiffs, as Assignees as aforesaid, *to retransfer* to them the last mentioned Stock, when he should be thereunto requested. Then aver the Value, as before; And assign the Breach, that though the Defendant afterwards, to wit &c, was requested by the Plaintiffs *to retransfer* to them the last mentioned Stock, Yet the Defendant, not regarding &c, &c.

A second Action was afterwards brought, for *fraudulently procuring Mettavier* the Bankrupt, to transfer the Stock, after his Bankruptcy, to the Defendant: by which means the Plaintiffs, the Assignees, were deprived of it. But on the Trial of this second Action, the Plaintiffs were nonsuited, without going into the Merits of the Case; for want of producing a Bill in Chancery which was necessary to intitle them to read some Depositions in the Cause in Chancery, and without which the Plaintiffs were not able to prove any Case at all.

Wednesday,
9th May
1770.

Rex versus the Inhabitants of the *West Riding* of
Yorkshire.

THIS was an Indictment for not repairing a Public Bridge, called *Glusburne-Bridge*, situate upon and over a certain Rivulet called *Glusburne-Beck*, in the Township of *Glusburne* in the said *West-Riding*, in the High Way leading from *Otley* to *Colne* in the County Palatine of *Lancaster*; Charging that it was very ruinous and in great Decay, for want of Repairs, so that the Liege Subjects to the King could not go travel or pass, either on Foot or *Horseback*, or with their *Coaches* or *Carriages*: To the Common Nuisance &c, and against the Form of the Statute, and against the Peace, &c; And charging that the Inhabitants of the said *West-Riding* ought to repair the same. To which Indictment the "said Inhabitants pleaded a Plea of *Non debent reparare*;" because, they say, that a certain Public *Foot-Bridge*, from Time beyond Memory till the taking down the same as aftermentioned, was erected made and standing upon and over the said Rivulet in the King's Highway, for all the Subjects in this Realm to go pass and repass over *on foot*, at all times, at their Will and Pleasure; And that the Inhabitants of the said *Township of Glusburne*, before the Time mentioned in the same Indictment, to wit the first Day of *December 1744*, took down the said *Foot-bridge*, and in lieu and stead thereof, and in the place where the

the said *Foot-bridge* had been erected and stood, did *erect and set up* the said Bridge in the said *Indictment* specified; And that the Inhabitants of the *Township of Glusburne* aforesaid, for Time immemorial till the Time of taking down the said *Foot-bridge*, had repaired the *same*; and from the Time of erecting the said Bridge, had repaired and still ought to repair the said Bridge in the said *Indictment* specified: And they traverse the Right (the Obligation) of the Inhabitants of the *West Riding* "to repair the said Bridge." And upon that Traverse Issue is joined."

THIS CAUSE came on to be tried at the last Assizes holden for the County of *York*, before Mr. Justice GOULD; when it appeared in Evidence, as follows; *viz.*

There was an *ancient Foot-Bridge* over *Glusburne-Beck* in the *Indictment* mentioned; and a *Ford for Horses*; and another for *Carriages*; being in the King's *Common Highway*, leading from *Otley* to *Colne* aforesaid.

The *Inhabitants of Glusburne* had always repaired the said *Foot-Bridge*.

In the Year 1743, the Inhabitants of *Glusburne*, being desirous of having a *Bridge for CARTS and CARRIAGES* over the said Stream, did apply for Assistance, to the *General Quarter-Sessions* of the Peace holden in and for the said *West-Riding*: And thereupon, on the 11th of *January* 1743, It was by that Court ordered "that the Treasurer of the said Riding should pay or cause to be paid to *Haworth Currer Esq*; or as he should direct, the Sum of 10*l.* for the Use and Benefit of the Inhabitants of *Glusburne* in the said Riding, and as a GRATUITY out of the said Riding's Stock, to enable the said Inhabitants to build a Bridge over a Ford called *Glusburne-Ford*, across a Water called *Glusburne-Beck*."

By a subsequent Order of Sessions, dated 18th *July* 1744, reciting that the Execution of the abovementioned Order had been stayed and suspended by Order of Sessions," It was then Ordered That the *Treasurer* should pay into the Hands of Mr. *Bradley* 10*l.* by him to be laid out in and towards building the said intended Bridge: PROVIDED that nothing therein or in the said former Orders or any of them contained should extend or be construed to extend to charge the Inhabitants of the said Riding, in time to come, with the REPARATION of the said intended Bridge or any Part thereof.

In

In pursuance of the said Order, the Sum of ten Pounds was paid.

The Inhabitants of *Glusburne* did build a Bridge for Carts, Carriages and Horses and Foot-passengers; and pulled down the ancient Foot-Bridge, and sold the Materials thereof, and received the Money for the same: Which Bridge so built was of Public Utility, and used constantly afterwards by all Persons passing that Road, till the Year 1767, when the same was taken away by a Flood.

The Ancient Bridge stood about sixty Yards below the said New Bridge, in the same Highway.

The said Road was made a Turnpike Road, by virtue of an Act of Parliament in the Year 1755; And about four Years ago, the Sum of Six Shillings was paid, for a Repair done to the New Bridge, out of the Tolls arising from the said Roads: Which is all the Repairs which have been done at the Bridge, since 1759.

WHEREUPON the Defendants were found GUILTY; Subject to the Opinion of this Court on the following Question—

“ Whether the Inhabitants of the *West-Riding* are
“ obliged to rebuild the said New Bridge.”

Mr. *Wainman* argued, that they were: Mr. *John Lee*, that they were not.

See 1 Ro. Abr. 368. Title “ Bridges.” pl. 1. 2. 2 Inst. 701. (on the Statute of 22 H. 8. c. 5. concerning the Repairing of decayed Bridges in Highways, and by Whom.) Magna Carta. c. 15. Cro. Car. 365, 366. the Case of *Langforth* Bridge. 13 Co. 33. 1 Salk. 359. *Regina v. Inhabitant Com. Wilts.* (where it is said that *Northey* Attorney General cited a Case wherein it was adjudged, “ that if a private Person build a Bridge which afterwards becomes a Public Convenience, the County is bound to repair it.”) 9 G. 2. c. 29. for building *Westminster-Bridge*: by the antepenult Clause whereof, it is expressly provided “ that the Counties of *Surry* and *Middlesex* shall not be subject to the Repairing or Supporting of it.” 6 Mod. 307.

THE COURT were All clear, that the RIDING was obliged to repair the New Bridge.

Mr. Justice ASTON observed, that this New Bridge was not built in the same *Place* where the Foot-bridge stood; but at the Distance of more than sixty Yards above it.

The Inhabitants of the *County* are of Common Right bound to repair all Public Bridges; because they are for the *Benefit of the County*.

By *Magna Carta*,* no Town or Freeman shall be distrained * V. c. 15. to make Bridges &c; except Those who were antiently and of Right used to make them in the Time of King *Henry* the Second.† The Inhabitants of *Glusburne* were not bound to build † V. 2 Inst. this new Bridge for Carts and Carriages; Nor are they obliged to²⁹ repair more than they were before bound to repair: And they never were bound to repair a Bridge for Carts Carriages and Horses. What they were bound by Prescription to repair, was only a Foot-bridge. They have built a quite different Bridge, in a different Place. This new Bridge is for the Common Benefit and Utility of the County: And the Sessions approved of it, and contributed towards it.

The Case in 1 Ro. Abr. 368. Title "Bridges," pl. 2. about a Mill erected for a Person's own Benefit, is a different Case. That Case is, that "if a Man erects a Mill for his *own Profit*, and " makes a New Cut for the Water to come to it, and makes a " New Bridge over it, and the Subjects use to go over this as " over a Common Bridge; this Bridge ought to be repaired by " Him who has the Mill, and *not* by the County; because he " erected it for his *own Benefit*." There, the private Emolument continued to the Person who erected it: And it was not reasonable for him to make the Country contribute to it, whilst the private Benefit continued to Himself. But this Bridge for Horses Carts and Carriages was for the Common Benefit Use and Utility of the County in general; and therefore is within the Rule, "that if a Man builds a Bridge, and it becomes *usefull* " *to the County in general*, the *County shall repair it*." The Common Law therefore attached upon this Bridge; and the County ought to repair it. It appears, that the Quarter-Sessions approved of it, and even contributed to it.

Mr. Justice WILLES concurred in Opinion with Mr. Justice ASTON. It seems to have been originally intended as a Bridge for the Common Public Utility of the County; and to

have been so considered by the Quarter-Sessions; and has ever since been used as such. The County have had the Advantage of it above twenty Years: And they ought to repair it.

* 1 Ro. Abr.
368. pl. 2.

Mr. Justice BLACKSTONE also concurred in the same Opinion. He made the same Observation as Mr. Justice ASTON had done, "that this New Bridge is sixty Yards Distant from the Place where the Old One stood." And he likewise took Notice, that *Magna Carta*, c. 15. does not apply to this Case. The Words are—"Nulla Villa nec liber Homo distringatur facere Pontes, &c." It says Nothing about repairing them. In the Case cited from *Roll's Abridgment*,* the Person who erected the Mill and made the Bridge, continued to receive his original private Benefit. Here, the Benefit and Utility were to the Public: It was constantly used by Every One who went that Road.

LORD MANSFIELD (who came into Court during the Discussion of this Case,) declared himself likewise to be clearly of the same Opinion. The Riding ought to repair it, undoubtedly.

THE COURT thereupon directed, unanimously, that

Judgment be entered for the KING.

Rex *versus* Grimes, Capital Burgefs of *Yarmouth* in the Isle of *Wight*.

THIS Case came before the Court upon a very long Special Verdict upon an *Information*.

It was an *Information* in Nature of a *Quo Warranto*, against *Thomas Grimes*, to shew by what Authority he claimed to be One of the Chief Burgeffes of the Burrough of *Yarmouth* in the Isle of *Wight*.

Several Issues were joined: And the Cause went down to Trial, and was tried at *Winchester* before Mr. Justice Gould; and an extremely long and unnecessary Special Verdict was found, which now came on to be argued: But the Points debated in Court were contracted into a much narrower Compass; And the Argument in this Court turned upon these two Issues, viz. First, "Whether the Defendant was *duly Elected*;" and secondly, "Whether *John Leigh* was Mayor, at the Time when the Defendant was elected."

The

The Clause in the Charter which directs the Mode of electing a Mayor is expressed in the following Words—" Quod Major
 " et *undecim* Capitalium Burgensium Burgi prædicti pro tem-
 " pore existen' *vel Major Pars* EORUM (quorum Majorem Bur-
 " gi prædicti pro tempore existen' Unum esse volumus) de tem-
 " pore in tempus perpetuis futuris temporibus imperpetuum,
 " Potestatem et Auctoritatem habeant et habebunt, annuatim
 " et quolibet Anno, in Festo Sancti Mathæi Apostoli, in le
 " Guildhall Burgi prædicti *sepe asselandi et congregandi* et ibidem
 " *Continuandi* quousque ipsi *vel* EORUM *major Pars* IBIDEM
 " ADTUNC *asselat'* eligerent & nominaverint Unum Majorem,
 " *de Semetipsis*, pro anno sequen'; Et quod eligere et nominare
 " ibidem possint et valeant unum *de Seipsis* qui erit Major Burgi
 " præd' pro uno anno integro ex tunc prox' sequen' et dein-
 " de quousque ipse vel aliquis alius Burgens' de Burgo præ-
 " dicto ad Officium illud debito modo elect' præfect' et jurat'
 " fuerit; Quodque ille, postquam sic ut præfertur elect' et
 " nominat' fuerit in majorem Burgi prædicti, antequam ad Of-
 " ficiū illud exequend' admittatur, Sacrum Corporal' super
 " sanctum Dei Evangelium annuatim in die lunæ prox' post
 " præd' festum scī Mathæi Apostoli, coram ultimo majore
 " prædecessore suo adhuc pro tempore existen', aut in ab-
 " sencia ejusdem Majoris, coram Burgensibus Burgi prædicti
 " qui tunc presentes fuerint vel majori parte eundem pro tem-
 " pore existen', ad Officium illud rectè benè et fideliter in om-
 " nibus Officiū illud tangen' exequend' præstabit; et post hu-
 " jusmodi sacrum sicut præfertur præstit', Officiū Majoris Bur-
 " gi prædicti pro uno anno integro tunc prox' sequen' suscipiat
 " et exequi valeat et possit." Then follows a Clause, that upon
 the Death or Amotion of a Mayor, the Burgesses for the " Time
 " being, *or the Major Part of them*, may elect unum alium de
 " seipsis, in tempore convenien' postquam ipse sic obierit vel
 " ab Officio suo amot' fuerit; who is to hold during the Re-
 " sidue of the Year, and to be sworn in forma prædictâ."

The Special Verdict finds the whole Proceedings (at Length) of an Information in nature of *Quo Warranto* against *John Leigh* who presided as Mayor at the Election of the Defendant into the Office of Capital Burgesses; and the Judgment against the said *John Leigh* thereupon.

It also finds, that on 1st September 1759, and continually from thence until and upon 7th April 1760, there were and existed eleven Chief Burgesses of the said Burrough, namely, *Benjamin Leigh, Henry Holmes, Barnabas Eveleigh, John Leigh, Thomas Lord Holmes, Maurice Bockland, George Bockland, Robert Warner, Den-*
 nis

nis Clarke, Charles Holmes, and Thomas Througbear; And that upon the 21st Day of September 1759, the said Day being the Feast of St. Matthew the Apostle in that Year, the said Benjamin Leigh the then Mayor of the said Burrough, and three of the said Chief Burgeses of the said Burrough, namely Henry Holmes, Barnabas Eveleigh and John Leigh, only, then being the MINOR Part of the then Chief Burgeses of the said Burrough, assembled themselves together at the Guildhall of the said Burrough in order to elect a Mayor of the said Burrough for the year then next ensuing; and being so assembled did then and there, in the Absence of the other Chief Burgeses of the said Burrough being seven in Number, namely Thomas Lord Holmes, Maurice Bockland, George Bockland, Robert Warner, Dennis Clarke, Charles Holmes, and Thomas Througbear, choose and elect the said John Leigh, then being a Chief Burges of the said Burrough, into the Office of Mayor of the said Burrough for the Year then next ensuing.

The Verdict finds that the said John Leigh, being so elected as aforesaid, did afterwards take the Oath of Office; and took upon himself to execute the Office of Mayor of the said Burrough.

The Jurors further find, That the said John Leigh, being so chosen and sworn into the Office of Mayor, and acting and attending as Mayor, together with five other Chief Burgeses, namely &c, &c. on 7th April 1760, met and assembled together in the Guildhall, in order to elect a Chief Burges in the Room of James Blake then dead; there being then five other Chief Burgeses not present at the said Meeting.

That at that Time (of the said last Meeting) No One of the eleven Chief Burgeses then existing was an Inhabitant of the Burrough; and that No One of the said five Chief Burgeses not present at the said Meeting, was then within the said Burrough.

They find that Notice in Writing, "to meet on the said 7th of April, to elect a Capital Burges in the Room of James Blake," was left at the Dwelling-house of two who did reside in the Island but not in the Burrough; and that two others dwelt within the Island, but not within the Burrough; but no Notice was left at their Houses, nor were they then in the Island. That from the Year 1743, to the Time of finding the Verdict, the Method of giving Notice "to assemble," (except upon a Charter or prescriptive Day,) hath been and is, "to deliver or leave a Notice in Writing for each respective Chief Burges then living in the Isle of Wight, although not within the Burrough; except such Chief Burgeses as espoused the Interest of Mr.

" *Holmes* and *Mr. Leigh*, being the Major Part of the Chief
" *Burgesses*."

They find, that *six* Chief *Burgesses*, so assembled on 7th *April* 1760, elected the Defendant *Grimes* into the Office of a Free *Burgess* in the Room of *Blake*; And that *no other Notice* was given, except as above mentioned.

THE COURT, after hearing two Arguments, unanimously gave Judgment for the King, against the Defendant.

An Objection having been made, by the Prosecutor's Counsel, to the Election of the Defendant *Grimes* into the Office of a Capital *Burgess* in the Room of *Blake*, " for Want of *due Notice* of such Election being given to the Electors;" They held the Objection to be sufficiently answered by it's being found " that *No One* " *of them was then resident within the Burrough.*" For, if they were " *not within Summons*, it was not necessary to summon them."

Secondly, a Question having been made " Whether the Special " Verdict found on the Information against *John Leigh* for " usurping the Office of Mayor, and the Judgment given there- " upon against him, were EVIDENCE in the present Cause against " *Grimes* for usurping the Office of Capital *Burgess*; And to " what Degree it ought to be allowed;" They held it to be *admissible*, but NOT *conclusive*.*

* *V. Rex v.*
Hebden, 2 *Sir*
I. S. 1109.

Thirdly, They held that *John Leigh's* Election to his Mayoralty was not pursuant to the Directions given by the Charter, for the Election of a Mayor; It having been made by *four only* of the Electors, when there were *eleven* existing. The reasonable Construction of the Charter they held to be, That the Mayor and a *Major Part* of the subsisting *Burgesses* must meet: The Directions of the Charter are " that the Mayor and eleven *Bur-* " *gesses, vel Major Pars eorum*, are to meet, in order to proceed " to such Election." AFTER the *Major Part* of the subsisting Number are so assembled together, *then* indeed the *Major Part* of *those who are so assembled* are to elect and nominate: And the Majority amongst those so assembled involves the whole Number; who are All bound by the Determination of the Majority of such a Meeting. But here the Mayor and a *Major Part* of the subsisting *Burgesses* did *not* meet. For, at the Time of *John Leigh's* Election to the Office of Mayor, there were *eleven* Chief *Burgesses* subsisting; And the Meeting at which he was elected was composed of the *Minor Part* of them, namely *Benjamin Leigh*, the

then Mayor, and *three* of the Others; being only four in all: whereas the whole Number was eleven; of whom *seven* were absent.

JUDGMENT for the KING.

Friday 11th
May 1770.

Kimber, qui tam &c. *versus* Blanchard.

THE Question was, Whether the Defendant had incurred the Penalty of 3 G. 1. c. 13. "for the better regulating
" of Pilots for conducting of Ships and Vessels from *Dover, Deal,*
" and the Isle of *Tbanet*, up the Rivers of *Thames* and *Medway*,"
by *piloting* the Vessel of which *He himself* was Master.

The first Section of this Act recites "that there has been
" Time out of Mind, and now is, a very usefull and well regu-
" lated Society or Fellowship of PILOTS of the *Trinity-house*
" of *Dover, Deal*, and the Isle of *Tbanet*, who have always had
" the *Sole piloting* and Load-manage of all Ships and Vessels
" from the said Places, up the Rivers of *Thames* and *Medway*;"
and that "by the Usage and good Rules and Orders of the said
" Society, every Person must appear at a Court Leet of Load-
" manage, and be *publickly examined* by some of the elder and
" more experienced Members of the said Society and Fellowship,
" touching his Skill and Abilities in Pilotage, before he is to be
" *admitted a Member* of the said Society or Fellowship, or ought
" to undertake the Conducting and Piloting *any* Ship or Vessel
" from the beforementioned Places up the said Rivers; whereby
" ignorant and dangerous Persons have been prevented from
" undertaking such Pilotage, and there hath been from time to
" time a sufficient Number of *safe and able Pilots* for the said
" Rivers maintained and kept up;" and also that "notwithstand-
" ing the many and great Advantages of the said Society or
" Fellowship to the Public, several *unqualified* Persons have of
" late taken upon them the Piloting and Conducting Ships or
" Vessels by and from the Places beforementioned up the said
" Rivers of *Thames* and *Medway*, who have *not been admitted*
" into the said Society or Fellowship or *undergone any Examina-*
" *tion of their Abilities* for such Service; whereby the said usefull
" Society or Fellowship hath been *much discouraged*; and several
" *Ships and Vessels with their Cargo and Mariners* have been *lost*
" or in the utmost Danger and Hazard:" For Remedy whereof,
it enacts That if *any Person or Persons* shall (after 1st August 1717)
take upon him or themselves to conduct or pilot *any* Ship or
Vessel by or from *Dover, Deal*, or the Isle of *Tbanet*, to any Place
or Places in or upon the said Rivers of *Thames* and *Medway*,
before

before he or they shall be *first examined* as has been usual by the Master and Wardens of the said Society or Fellowship for the Time being, touching his or their Abilities, and shall be *approved and admitted* into the said Society or Fellowship at a Court of Load-manage, by the Lord Warden of the Cinque-Ports for the Time being or his Deputy, and the said Master and Wardens for the Time being; *Every such Person or Persons* shall, for the first Offence, *forfeit* ten Pounds; for the second, twenty Pounds; and for every other Offence, forty Pounds; to be sued for, &c &c: one Moiety thereof, to the Informer; the other, &c &c.

Mr. Serjeant *Leigh*, on Behalf of the Plaintiff, argued, that this Act of Parliament professedly made for the Safety of Ships, the Encouragement of this usefull Society of able and experienced Pilots, the Suppression of unqualified Pretenders, and the Preservation of Ships and Cargoes and of the Lives of Mariners, was as clear and explicit as possible in excluding *ALL other Persons whatsoever* who had not previously undergone a proper Examination of their Abilities to perform such Service, and been regularly approved and admitted into this usefull and well regulated Society.

Mr. *Cox*, on the contrary, on behalf of the Defendant, considered this Act of Parliament as pointed against Persons resident at *Deal* and *Dover* and the Isle of *Thanet*, and undertaking to pilot Ships up the *Thames* and *Medway*, without being properly qualified for it. But it could never mean, he said, to preclude a Master of a Ship or Vessel from navigating his *own* Vessel, if he was willing, desirous, and able to do it: It could not mean to oblige such a Person to stop at One of these Places, to take in a Pilot, under so severe a Penalty, when he was able and willing to pilot his own Vessel, and perhaps unable to pay a Pilot. In *London*, You can't employ a Non-Freeman, to carry a Bundle: But You may carry it *Yourself*. And he argued from an Expression used in a Subsequent Act of Parliament made about three Years after this Act of 3 G. 1. namely 7 G. 1. c. 21. § 14. that the former did not extend to such Ships and Vessels as did not want the Assistance of a Pilot. For, this latter Act, which refers to the former, and proposes to remedy the Mischiefs not sufficiently prevented by it, allows of eighteen of these *Trinity-house* Pilots being ordered to ply constantly at Sea, "to be ready " to conduct up the *Thames* and *Medway* Such Ships and Vessels " as may have OCCASION for them:" which plainly implies that there might be *other* Ships and Vessels, which had *no* Occasion for them, and therefore were not obliged to employ them.

* Mr. Justice
Aston was in
 Chancery,
 sitting there as
 One of the
 Lords Com-
 missioners of
 the Great
 Seal.

But *THE COURT were so clearly of Opinion for Mr. Serjeant *Leigh*, that they stopt him from replying; as the Case was so very plain that it was unnecessary for him to say any thing more upon it: And they ordered

That the POSTEA be delivered to the PLAINTIFF.

☞ See the Construction of this Statute discussed in the Case of *Pierce v. Hopper*, 1 Sir John Strange, 249 to 261.

Fairclaim on the Demise of James Empson against William Shackleton.

THIS was an Action in Ejectment for one undivided Moiety of Two Messuages, Two Cottages, Two Barns, Two Stables, Two Orchards, Two Gardens, Twenty Acres of Land, Twenty Acres of Meadow, and Twenty Acres of Pasture with the Appurtenances in *Beckwith with Rossset*, and in the Parish of *Pannall* in the County of *York*; to which the Defendant pleaded the general Issue “not guilty” and Issue was thereupon joined.

THE Cause came on to be tried at the last Assizes held for the County of *York*, before the Honourable Mr. Justice *Gould*; when it appeared in Evidence, that *Thomas Hammond*, *Miles Oddy*, *Roger Shackleton* and *Jane* his Wife, and *Patience Readshaw*, being seised in Fee of the Tenements herein after mentioned according to the Custom of the Forest of *Knaresbrough* in the said County, (where Lands pass by Surrender and Admittance) did on the first Day of *August* 1721, out of Court according to the Custom of the said Forest, surrender One Messuage with all Edifices and Appurtenances to the same belonging, And also Six Acres of Land, Meadow or Pasture, be the same more or less, with all the Appurtenances to the same belonging, situate lying and being in *Beckwith cum Rossset* within the Village of *Killingball*, then in the Occupation of *William Lawson* or his Assigns; As to one Moiety of the said Premises, To the Use and Behoof of the said *Jane Shackleton* her Heirs and Assigns for ever, According to the Custom of the Forest aforesaid; And as to the Other Moiety of the said Premises, To the Use and Behoof of the said *Patience Readshaw*, her Heirs and Assigns for ever, according to the Custom of the said Forest.

THAT

THAT, at a Court held for the said Forest of *Knareſbrough* on the 17th Day of *Auguſt* aforeſaid, the ſaid *Jane Shackleton* and *Patience Readſhaw* were reſpectively duly admitted Tenants upon the ſaid Surrender according to the Cuſtom of the ſaid Forest.

THAT, in the Month of *July* 1723, the ſaid *Patience* inter-married with *Emanuel Empſon*; and on the 19th *September* following, the ſaid *Emanuel* and *Patience* his Wife, out of Court, according to the Cuſtom of the ſaid Forest, ſurrendered the ſaid undivided Moiety of the ſaid Tenements to which the ſaid *Patience* had been admitted as aforeſaid, (being the Premiffes in Queſtion in this Cauſe,) To the Uſe and Behoof of the ſaid *Emanuel Empſon* and *Patience*, their Heirs and Aſſigns for ever; And that, at a Court held for the ſaid Forest on the 17th Day of *October* in the Year 1723, the ſaid *Emanuel Empſon* and *Patience* his Wife were duly admitted Tenants thereof according to the ſaid Surrender.

That in the Year 1724, the ſaid *Patience* died without Iſſue, and the ſaid *Emanuel* ſurvived her; And that on the 20th Day of *April* 1728, the ſaid *Emanuel* alſo died without Iſſue.

THAT, at a Court held for the ſaid Forest on the 29th *May* 1728, *Benjamin Empſon*, Brother and Heir at Law to the ſaid *Emanuel*, was, according to the Cuſtom of the Forest, admitted Tenant to the ſaid Moiety of the ſaid Tenements; To hold to him his Heirs and Aſſigns for ever, according to the Cuſtom of the ſaid Forest.

THAT, in *Hilary* Term following, the ſaid *Benjamin Empſon* obtained Judgment in Ejectment by Default againſt the ſaid *William Lawſon* Tenant of the Premiffes, in his Maſteſty's Court of *Common Pleas* at *Weſtminſter*, for the ſaid Moiety; And that afterwards, on the 10th Day of *April* 1729, the ſaid *William Lawſon* then Tenant of the whole Premiffes, by Writing under his Hand, acknowledged to have attorned Tenant to the ſaid *Benjamin Empſon* for the ſaid undivided Moiety of the ſaid Meſſuage and Premiffes, and in Purſuance thereof, afterwards Once paid Rent for the ſame to the ſaid *Benjamin Empſon*.

THAT the ſaid *Benjamin Empſon* died on the 5th Day of *June* 1734; and, at a Court held for the ſaid Forest on the 24th Day of *July* following, *Benjamin Empſon*, an Infant about Nine Years of Age, his Nephew and Heir at Law (by *Ann Watſon* his Mother,) was admitted Tenant to the ſaid undivided Moiety of the ſaid Tenements;

TO HAVE AND TO HOLD to the said *Benjamin* the Nephew his Heirs and Assigns for ever, according to the Custom of the said Forest.

THAT the last-mentioned *Benjamin Empson* died on the 9th Day of *August* 1754, leaving *James* the Lessor of the Plaintiff his eldest Son and Heir at Law, an Infant between ten and eleven Years of Age, and who afterwards at a Court held for the said Forest, on the 15th Day of *October* 1766, was admitted Tenant to the aforesaid undivided Moiety; To have and to hold to him his Heirs and Assigns for ever, according to the Custom of the said Forest.

THAT the abovenamed *Jane Shackleton* died in 1729, leaving the present Defendant then an Infant, her eldest Son and Heir at Law; who afterwards, at a Court held for the said Forest on the 13th *August* 1729, was by *Roger Shackleton* his Father and Guardian admitted Tenant to her undivided Moiety of the said Tenements; To HOLD the same to the said Defendant his Heirs and Assigns for ever, according to the Custom of the said Forest.

THAT the said *William Lawson*, about TWENTY-SIX Years ago, proposed to deliver up the Farm to his Son *Christopher Lawson* if Mr. *Shackleton* would take him in Tenant; which *Shackleton* agreed to do; And that thereupon he entered upon Possession thereof, and has paid the Rent to the Defendant *Shackleton* for the WHOLE Premises ever since.

THAT at the Time *Shackleton* agreed to take him as Tenant in the Place of his Father, the said *Christopher*, by his Father's Order and on his Account, paid Rent to the said *Shackleton* alone for the whole of the Premises; and that no other Payment of Rent, except as aforesaid, appeared on either Side.

WHEREUPON a Verdict was given for the Plaintiff subject to the Opinion of his Majesty's Court of King's Bench upon this the following Question

“ WHETHER the Plaintiff is barred from recovering,
“ by the Statute of Limitations.”

JA. WALLACE for the Plaintiff:
J. ASPINALL for the Defendant.

Mr.

Mr. *Walker* argued for the Plaintiff; Mr. *John Lee*, for the Defendant.

Mr. *Walker* denied that *James Empson* was barred by the Statute of Limitations. He was never out of Possession. The Statute therefore never run upon him. Parceners, Joint-tenants, and Tenants in Common, have a *joint* Possession. They have a *joint* Occupation and *joint* Management of the *Whole*: The Possession of One is the Possession of *Both*. Therefore, the Possession of *William Shackleton* was the Possession of *James Empson*. And he was *never actually ousted*. Perception of Profits does not amount to an Expulsion. One Tenant in Common may indeed disseize Another: But then it must be done by *actual Disseisin*, and *not* by bare Perception of Profits only. And the Statute of Limitations never runs against a Man, but where he is *actually* ousted or disseized. For all which Doctrine, he cited *Reading v. Royston*, in 2 *Salk.* 423. and in 2 *Lord Raymond* 829. and the Case of *Ford v. Lord Grey*, y. 6 *Mod.* 44. and 1 *Salk.* 285. where the 1st Resolution is express, "that the Possession of One Joint-tenant is the Possession of the Other, so far as to prevent the Statute of Limitations."

Mr. *LEE* said, There was a Difference between Joint-tenants, and Tenants in Common. But if there were not, yet the Case of the Earl of *Suffex a Temple &c.*, in 1 *Lord Raym.* 310. is contrary to the Case in 2 *Ld. Raymond.* 829. For, *Holt* there says, (pa. 312.) that "as to the Possession of One Tenant in Common being the Possession of the Other, that does not hold Place against the Statute of Limitations: And besides that, if One of them only takes the Profits, it is an *Ousting* of the Other," And he said, that the Case of *Story v. Lord Windsor* and Others, 2 *Atkyns* 632. was in Point, since the Statute of *Queen Ann.* The Court can not now attend to the old Observation "that the Possession of the One is the Possession of the Other." The Possession of One Tenant in Common is now as adverse as the Possession of any other Person. And it is a Bar after 20 Years. *V. ante*, 119.

Mr. *Walker* was beginning to reply: But Lord MANSFIELD stopt him, as being unnecessary.

HIS LORDSHIP laid it down, that there must be an *adverse* Possession, in order to enable the Statute of Limitations to run. There must be a *Disseisin*; and a *Disseisin strictly proved*. (And he referred to the Case of *Taylor, ex dimiss. Atkyns Esq; v. Horde Esq;* and Others (*V. ante* 60.) and to *Fermor's Case*.)

But here is *no Disseisin*. The sole Title of the Defendant is his Admittance, in 1729, to an undivided Moiety of the Premises. He is so far from a Disseisor, that he allows the Title of the Other.

If there had been a Question about Ouster, it might have been a Fact to be left to a Jury. But I am clear, that the Defendant never meant to disseise the Plaintiff, nor thought of it. The Tenant was never desired to attorn for the Whole: He only attorned for an undivided Moiety, and once paid Rent for the same. And *Shackleton* once received Rent alone, for the Whole, without paying any of it over to the Other. But this is *no actual Ouster*.

Mr. Justice WILLES and Mr. Justice BLACKSTONE concurred. (Mr. Justice ASTON was absent, in Chancery.) Here is *no adverse Possession*; no Keeping the Plaintiff out of Possession. One Tenant in Common has received the Rent, and not accounted for it to the Other. But here is *no Expulsion, no Ouster*.

THE COURT unanimously ordered

That the POSTEA be delivered to the PLAINTIFF.

Roe, on the Demise of Betty Bendale, against Summerfet, Mary Bendale Widow, and Mary Bendale the Younger.

In Ejectment—

UPON a Case reserved at the Assizes holden at New Sarum on 31st March 1770. The Short Substance of it was, That *Benjamin Bendale*, being possessed of a Term for 99 Years if he or his Daughter Betty or *John Bendale* should so long live, devised the Premises granted by such Lease, as follows, viz. “Item, I give to my Daughter *Mary*, after the Decease of my Daughter Betty, my House &c, during the Life of *John Bendale*.” Betty was a Daughter by a former Wife: *Mary*, by the Defendant *Mary Bendale*, now his Widow. *Summerfet* was the Tenant. The Principal Question was “Whether Betty was intitled to recover any and what Part of the Premises, against the Defendants or Either of them.”

Mr. Gould, for the Plaintiff, argued that Betty was intitled to the Whole, for her Life, by Implication.

Mr.

Mr. *Ashurst*, *contra*, argued, that no such Intention of a Life-Estate could take place in a *Chattel-Interest*. And he cited *Moore* 635, *Rayman v. Gold*; and *Cro. James* 74, *Horton v. Horton*.

TWO Judges only were present, *viz.* Mr. Justice *Willes*, and Mr. Justice *Blackstone*. They Both held, that *Betty* took an Estate for Life, by Implication; and that a *strong probable Implication* is sufficient: It needs not to be a *necessary* Implication. Mr. Justice *Willes* spoke slightly of the Case in *Moore*; and Mr. Justice *Blackstone*, still more slightly, of the Case of *Horton v. Horton* in *Cro. James*: Which, he observed, was not determined, and was only upon a collateral Point. He added that in these Days, * a Term may be devised for Life, by a Construction of the Intent of the Testator. * V. ante, pa. 217, 285.

Ordered that the *Postea* be delivered to the Plaintiff.

Denn, on the Demise of William Creswick, *versus* Monday 14
Joseph Hobson and Seven Others. May 1770.

EJECTMENT for Messuages and Lands in *Wadsley* or *Wadsley Hoxley* in the Parish of *Ecclesfield* in *Yorkshire*.

The Cause was tried at the last Assizes at *Winchester*, before Mr. Justice *Gould*.

The Lessor of the Plaintiff claimed as *Grandson and Heir Male* of *William Creswick*, by *Sarah* his Wife, formerly *Dearnally*.

William Creswick, his Grandfather, on 27th January 1730, by *Deed of Feoffment*, in Consideration of his intended Marriage with *Sarah Dearnally*, and 150*l.* Marriage-Portion, conveyed the Premises to *John Dearnally* (Father of *Sarah*) and *Thomas Creswick*, and the Survivor of them and his Heirs; Upon Trust, as to Part, That they should stand seised, from the Marriage, To the Use of the said *William Creswick* and *Sarah*, for their Lives and the Life of the Survivor, in Part of her Jointure and Dower; Remainder, to the Use of the "HEIRS of the said *William Creswick* on the BODY of the said *Sarah* lawfully begotten or to be begotten; The MALE to be preferred before the FEMALE, and the ELDER before the YOUNGER."

The Residue of the Premises were limited to the *same* Uses, except the Use to *Sarah* for Life.

There was Issue of the Marriage, two Sons—

1st. <i>William Creswick</i>, (the Eldest;) who died in 1750, leaving Issue <i>Mary</i>; who died, leaving Issue <i>William Froggatt</i>, One of the Defendants.	}	2d. <i>John Creswick</i>; who died, leaving Issue two Sons, viz. <i>John Creswick</i> his Eldest, who died without Issue, And <i>William Creswick</i> his second, the Lessor of the Plaintiff.
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After a long Examination, the Identity of the Premises was sufficiently ascertained.

The *Lessor of the Plaintiff* claimed as HEIR MALE, under this Settlement.

On the Part of the *Defendants*, It was first insisted, either that old *William*, the Settler of the Estate, took a FEE-SIMPLE under the Remainder; and so the Defendant *William Froggatt* was his Heir at Law, as being the Son and Heir of *Mary*, the only Issue of *William*, the Eldest Son of the Marriage; Or, 2dly. that He was intitled as ISSUE IN TAIL general, under the Settlement.

But Mr. Justice GOULD thought, the *Lessor of the Plaintiff* was intitled, as Heir in TAIL MALE, to the Lands indorsed on the *Poslea*; (It being admitted "that he was barred as to the Rest, by a Fine and Nonclaim.")

A Verdict was found for the Plaintiff.

Mr. *Mansfield*, on behalf of the Defendants, moved for a New Trial.

The Question was "Whether this Limitation was in Tail Male; or Whether it was either a Limitation in Tail general, or, else a void Limitation, for its Uncertainty, so that *Mary*, the Daughter of the Eldest Son of old *William*, might claim as Heir at Law to Old *William* the Settler of the Estate." In either of the two latter Cases, the Claim of the Lessor of the Plaintiff, as Heir in Tail Male, would be at an End.

Mr.

Mr. *Mansfield* endeavoured to satisfy the Court, that there was Nothing to hinder the Descent to the Heir at Law, though claiming through a *Female*. The Limitation is to *all* the Heirs of the Body &c: And the Words "the Male to be preferred" before the Female, and the Elder before the Younger," were mere Words of *Form*, he said, and *operate Nothing*; and may be referred to the *immediate* Children of the Marriage, to shew how they should take. But

LORD MANSFIELD answered him, that if the Words have *any* Meaning, they describe an Estate in *Tail Male*: And it is not to be supposed that they were inserted *without any* Meaning at all.

The other three Judges, (Mr. Justice ASTON, Mr. Justice WILLES, and Mr. Justice BLACKSTONE) concurring clearly with his Lordship, it became unnecessary to hear Mr. *Wallace*, who was ready to shew Cause, on behalf of the Lessor of the Plaintiff, against Mr. *Mansfield's* Rule.

The whole COURT agreed with Mr. Justice GOULD, "that it was an Estate in *Tail Male*."

RULE DISCHARGED.

Rice v. Shute.

THIS was an Action brought *against One Partner only*, upon a *Partnership Account*.

At the Trial, (which was before Mr. Justice *Bathurst*,) the Defendant gave Evidence that there was *another Partner* (named *Cole*) who was *not joined* in the Action, as a Defendant; which he ought to have been, as the Plaintiff knew the Fact to be so.

Whereupon, the Plaintiff was *non-suited*.

Mr. Serjeant *Burland* moved (upon the 5th of this instant May 1770,) on behalf of the Plaintiff, to set aside this Nonsuit, and to have a New Trial.

It appeared upon the Judge's Report, That the Plaintiff could not but *know* of the Partnership: For that all the Letters shewed, and it was even stated upon the very Account itself, "that *Cole and Shute* were Partners." o that the Plaintiff was *not* surprised

surprized by the Defendant's producing this *Evidence* of a Partnership: On the Contrary, he had brought his Action in this manner against the present Defendant alone, with a deliberate Design to take some Advantage of him.

The Serjeant's Objection was, That this Matter could *not* be given in *Evidence*, but ought to have been *pleaded in Abatement*.

THE COURT gave him a Rule to shew why the Non-suit should not be set aside, and a New Trial had.

Mr. Serjeant *Davy* now (on this 14th May) shewed Cause.

He said, it would be very mischievous, if a Person having a Demand upon a Partnership should be left at Liberty to cull out One particular Partner, and bring an Action against him alone, leaving out the Rest of the Partners.

In the Case of *Boson v. Sandford*, 2 Salk. 440. the Court held "that All the Part-Owners of the Ship must be joined:" And they gave Judgment for the Defendant, *because* All the Owners were *not* joined.

This *may* undoubtedly be *pleaded in Abatement*: But it is not necessary that in *all* Cases whatsoever it *must* be pleaded in Abatement. In *some* Cases, and under certain Circumstances, and particularly where it is within the Plaintiff's *own Knowledge* "that there "are more Partners," it may be given in *Evidence*, without pleading it in Abatement.

Here, the Plaintiff *knew* that *Cole* was Partner with the Defendant. He was not surprized by this Evidence: He acted with his Eyes open, and with a deliberate Design to take an unfair Advantage.

If the Defendant had pleaded in Abatement, he must have *shewn* who his Partners were: And then the Plaintiff, being *thus informed* who they were, must have brought a *new* Action against them all. But in the present Case, the Plaintiff *already knew*, of his own previous Knowledge, "Who were the Partners:" And therefore he was as much obliged to bring his Action *originally* against them All, as he would have been obliged to bring a New Action against them All, if he had come at that Knowledge only by the Defendant's Plea in Abatement. As soon as he knows who the Partners are, he is obliged to bring his Action against them All; however he may come at this Knowledge. He can not, after having obtained this Knowledge, select One, and omit the

he Rest. It's being pleadable in Abatement shews that he can't omit Any One, if in fact there are more than One. And if he does know it before he brings his Action, it is more expeditious and more reasonable, that he should join them All at first.

And though it may have been heretofore holden "that it could not be given in Evidence," Yet that was only an Opinion at *Nisi prius*: There never has been any such Determination of this Court, or any where else in your Lordship's Time. And if it has been ever holden "that it was sufficient to make the *Acting* Partners Defendants," the Rule has been since established, "that *All* must be joined, if known."

He therefore prayed that the Nonsuit might be recorded.

Serjeant *Burland* was proceeding to support his Rule; But was stopped by *Lord Mansfield*, as not being necessary.

LORD MANSFIELD—

To be sure, a Distinction is to be found in the Books, between *Torts* and *Assumpsits*—"That in *Torts*, all the Trespassers need not be made Parties: but in Actions upon *Contract*, Every Partner must be made a Defendant." Many Nonuits, much Vexation, and great Hindrance to Justice, have been occasioned by this Distinction. It must have been introduced originally from the Semblance of Convenience that there might be One Judgment against all who were liable to the Plaintiff's Demand. But Experience shews that Convenience, as well as Justice, lies the other way. All Contracts with Partners are *joint and several*: Every Partner is liable to pay the *Whole*. In what Proportion the others should *contribute*, is a Matter merely among themselves. A Creditor knows with whom he dealt: but he does not know the secret Partner. He may be nonsuited twenty Times before he learns them all; or driven to a Suit in Equity, for a Discovery "Who they are." It is cruel, to turn a Creditor round, and make him pay the whole Costs of a Nonsuit, in favour of a Defendant who is certainly liable to pay his whole Demand; and who is not injured by another Partner's not being made Defendant; because, what he pays, he must have Credit for, in his Account with the Partnership. Upon this Point, I very early consulted the three other Judges of this Court, Mr. Justice DENISON, Mr. Justice FOSTER, and Mr. Justice WILMOT. They were All of Opinion, "that the Defendant ought to *plead it in Abatement*:" He then must say, "*Who* the Partners are." If the Defendant does not take Advantage of it at the Beginning of the Suit, and plead it in Abatement, it is a *Waver* of the Objection. He ought not to be permitted to lie by, and put

the Plaintiff to the Delay and Expence of a Trial, and then set up a Plea not founded in the *Merits of the Cause*, but on the *Form of Proceeding*. The Old Cases make no Distinction between the Plaintiff's *knowing* of a Partnership, or not. Here, indeed, the Plaintiff knew of it: But the present Defendant was the Person with whom he transacted. He must be allowed this, in his Account with the other Partners. No Injustice is done to the Defendant, by allowing the Plaintiff to recover: but great Injustice is done to the Plaintiff, by allowing the Nonsuit to stand; And, what is still worse, a Mode of Litigation allowed, which is highly inconvenient.

Mr. Justice ASTON concurred.

He said, that as his Lordship had gone through the Whole, he would not repeat what had been already mentioned: But he observed, that there was no Necessity for admitting it to be given in Evidence; nor any Inconvenience in pleading it in Abatement; And the not pleading it in Abatement seemed to be a Waver of the Objection.

The Case in which Mr. Justice YATES tried the Cause, was a Contract about Wood: But it was never decided here by the Court.

He took Notice, that upon a *Joint-Bond*, the Action can't be brought against ONE of the Obligors *only*. This was the Point of a Case in *Michaelmas* Term 1750, 24 G. 2. in this Court; which was argued by the now Lord *Lifford*: The Name of it was *Horner v. Moor*.* [*I have a Note of this Case. "*Non est factum*" was pleaded: And the Jury found it to be the Deed of *Both*. Mr. Serjeant *Hewitt* moved in Arrest of Judgment, upon the Face of the Declaration. He acknowledged, that it could not have been moved in Arrest of Judgment, if it had not appeared upon the Face of the Declaration: But it there appeared, that Both had sealed the Obligation, and Both were living. He owned, that if it had not appeared upon the Face of the Declaration, it must have been averred. Mr. *Ford*, who was for the Plaintiff, gave it up; And the Judgment was arrested.]

Mr. Justice WILLES and Mr. Justice BLACKSTONE being Both of the same Opinion,

The WHOLE COURT were unanimous, that the Nonsuit ought to be set aside, and a New Trial had.

RULE made absolute.

[N.B. There was a Case solemnly argued and determined in the *Common Pleas* upon this Point, in *Easter* Term 1774, 14 G. 3. and they

they held, upon the Authority even of Cases in the Year-books, "that it should be pleaded in Abatement." The Name of it was *Abbot v. Smith*. After Argument, it stood for the Opinion of the Court: And *Ld. Ch. J. De Grey* afterwards delivered their Opinion. He observed that this was not a Novel Doctrine or Invention. In Proof of which, he cited *Trin. 9 E. 4. 24. b. 10 E. 4. 5. a. & post*; 36 *H. 6. 38*; and *Brook, Brief 37*. And he took Notice, that this Case just now reported (of *Rice v. Shute*) went on the general Principle that the Court then went upon in the Case of *Abbot v. Smith*.

I was favoured with an Account of this Case of *Abbot v. Smith*, by a very learned Judge of the Court in which it was determined.]

Thomas Wills and Ann his Wife, and Others, Plaintiffs: Thursday 17
Henry Palmer Esq; and Others, Defendants. May 1770.

A Case directed to be made, by Order on the Hearing of this Cause on the 14th Day of March 1769, before the then Lord Chancellor (Lord Camden,) for the Opinion of the Judges of the Court of King's Bench.

BY INDENTURE quadripartite, made between *Archdale Palmer* Esq. and *Ann* his Wife, and *John Palmer* Gent' Son and Heir Apparent of the said *Archdale Palmer*, of the first Part; *Joseph Danvers* Esq. *John Danvers* Gent', and *Ann Danvers* One of the Sisters of the said *Joseph Danvers* and *John Danvers*, of the 2d Part; *Henry Palmer* Merchant, and *Henry Palmer* Son of the said *Archdale Palmer*, of the 3d Part; and *George Townshend* the Younger Esq. and *Charles Townshend* Gent', of the 4th Part; The said *Archdale Palmer* AND *John Palmer*, in consideration of a Marriage intended between the said *John Palmer* and *Ann Danvers*, and of 3000 *l.* the Fortune of the said *Ann Danvers*, and for settling and assuring the Manors, Messuages, Lands, Tenements, and Hereditaments therein after mentioned unto such Uses and upon such Trusts as are therein after mentioned, The said *Archdale Palmer* Ann his Wife and *John Palmer* covenanted to levy a Fine *sur Conuzance de Droit come ceo, &c.* unto the said *George Townshend* and *Charles Townshend* or the Survivor of them and the Heirs of One them, Of a Capital Messuage in *Thurcaston* in the County of *Leicester*, and of two other Messuages, One Cottage, and Ten Yard-lands in *Thurcaston* aforesaid; and of the Manor of *Wanlip* in the said County of *Leicester*, and of the Advowson of *Wanlip* aforesaid, and of a Capital Messuage, &c &c &c, and of all other the Manors, Messuages, Lands, and Hereditaments of the

the said *Archdale Palmer* and *John Palmer* or Either of them in *Wanlip Loughborough and Birstall* or any of them: The Uses of which Fine are thereby declared to be to the said *George Townshend* and *Charles Townshend* and their Heirs and Assigns, to the Intent that they should be Tenants of the Freehold of the Premises, in order to the suffering One or more Common Recovery or Recoveries thereof, wherein the said *Joseph Danvers* and *John Danvers* should be Demandants and the said *George Townshend* Tenant, and the said *John Palmer* Vouchee; Which said Fine and Recovery should enure to the several Uses, upon the Trusts, and subject to the Provisoes and Agreements therein after declared, to wit,

To the Use of the said *Archdale Palmer* his Heirs and Assigns, until the intended Marriage should be solemnized; And after the Solemnization thereof, Then

As to all the Premises in *Thurcaston*, Six Messuages &c in *Wanlip*, and One Yard-land in *Loughborough*, and the said Messuage &c in *Birstall*,

To the Use of the said *John Palmer* for Life, without Impeachment of Waste;

Then to the Use of the said *Joseph Danvers* and *John Danvers* and their Heirs, In Trust to support contingent Uses;

And after the Decease of the said *John Palmer*, To the Use of the said *Ann* his intended Wife, for her Life, without Impeachment of Waste except voluntary Waste, for her Jointure and in Bar of Dower;

And after the Deceases of the said *John Palmer* and *Ann* his intended Wife, Then to the Use of the first Son of the Body of the said *John Palmer* by his said intended Wife, and the Heirs Male of the Body of such Son;

And in Default thereof, To the Use of the 2d. 3d. 4th. 5th. and all and every other the Son and Sons of the Body of the said *John Palmer* by his said intended Wife successively, and to the several and respective Heirs Male of the respective Body and Bodies of such Sons;

And in Default thereof, To the Use of the said *Joseph Danvers* and *John Danvers* their Executors Administrators and Assigns, for the Term of 500 Years from thence next ensuing, upon the Trusts and for the Purposes and subject to the Agreements therein after expressed;

I.

And

And after the End or other Determination of the said Term, To the Use of the first Son of the Body of the said *John Palmer* by any *other* Woman he should marry, and the Heirs Male of the Body of such first Son;

Remainder to the Use of the Second and all other the Son and Sons of the said *John Palmer* by any *other* Woman he should marry, and their Heirs Male successively;

Remainder to the Use of the HEIRS MALE of the BODY of the said ARCHDALE PALMER;

Remainder to the Use of the Heirs of the Body of *John Palmer*;

Remainder to the Use of *John Palmer*, his Heirs and Assigns for ever.

And as for and concerning the said Manor of *Wanlip* with the Royalties and Appurtenances, and the Advowson &c of *Wanlip*, the Capital Messuage in *Wanlip* in the Occupation of *Archdale Palmer*, and all &c thereto belonging or therewith Used; from and after the Solemnization of the said Marriage,

To the Use of *Archdale Palmer* for Life, without Impeachment of Waste except voluntary Waste;

Remainder to the Use of *John Palmer* for Life, without Impeachment of Waste, except as before;

Remainder to the Use of *Joseph Danvers* and *John Danvers* their Heirs and Assigns, during the Life of the said *John Palmer*, to support the contingent Estates after limited;

Remainder, after the Decease of *Archdale* and *John Palmer* and the Survivor of them, To the Use of the said *Ann* the intended Wife of the said *John Palmer*, for Life, in Augmentation of her Jointure.

And as for the Residue of the Premises, whereof no Use was therein before limited—

From and after the Solemnization of the said intended Marriage, To the Use of the said *Archdale Palmer* for Life, without Impeachment of Waste;

Remainder to the said *Henry Palmer* and *Henry Palmer* their Executors Administrators and Assigns, for the Term of 300 Years, without Impeachment of Waste, Upon the Trusts and for the Purposes aftermentioned;

And after the End or other Determination of the said 300 Years Term, To the Use of *John Palmer* for Life, without Impeachment of Waste;

Remainder, to the Use of *Joseph Danvers* and *John Danvers*, upon Trust to support contingent Remainders;

Remainder, to the Use of *Joseph Danvers* and *John Danvers* their Executors Administrators and Assigns for 400 Years, Subject to the Provisoes and Agreements aftermentioned;

And as for the Premises contained in the said Term—

From and after the End or sooner Determination of the said Term of 400 Years,

And as for the said Manor of *Wanlip* with the Rights and Appurtenants, and the Advowson of the said Church of *Wanlip*, and the Capital Messuages in *Wanlip* with the Appurtenances before limited to the said *Archdale Palmer* *John Palmer* and *Ann* his intended Wife, in Remainder one after another for their respective Lives—

From and after their several Deceases, To the Use of the first Son of the said *John Palmer* by the said *Ann* his intended Wife, and the Heirs Male of the Body of such first Son;

Remainder, to the Use of the second Son, and all and every other the Son and Sons of the said *John Palmer* by the said *Ann* his intended Wife successively, and the respective Heirs Male of the respective Body and Bodies of all and every such Son and Sons;

Remainder, to the Use of the said *John Palmer* and the Heirs Male of his Body;

Remainder, to the Use of the said *Archdale Palmer* his Heirs and Assigns for ever.

The Term of Five Hundred Years was declared to be limited to the said Trustees, Upon Trust that in Case at the Time
of

of Failure of Issue Male of the Body of the said *Ann* to be begotten, or at any Time after, there should be One or more Daughters, the Trustees, by Sale or Mortgage of the said Term and by the Rents and Profits in the mean Time, should raise, if One Daughter, 3000*l.* to be paid Her at the Age of 21 or Marriage (which should first happen,) and also the yearly Sum of 100*l.* for her Maintenance and Education in the mean Time and till her Portion should become payable as aforesaid; And if two or more Daughters, Then 3000*l.* to be equally divided at 21 or Marriage, and such yearly Sum for their Maintenance and Education as to the Trustees should seem meet, not exceeding the Interest of their respective Portions at five *per Cent.*

The Term of 300 Years was declared to be limited to the two *Henry Palmers* their Executors &c, Upon Trust, that after *Archdale Palmer's* Decease, the said Trustees should raise 500*l.* and pay the same to such Persons as the said *Archdale Palmer* should by Deed or Will appoint.

The Term of 400 Years was declared to be limited to the Trustees, for raising 1500*l.* for the Portion of Younger Children (of which there were None,) payable as there is mentioned.

The Fine and Recovery were accordingly suffered.

The said Marriage took Effect: and about 24th *August* 1726, the said *John Palmer* died, in the *Life-time* of his Father *Archdale Palmer*; leaving the said *Ann* his Widow, and only One Child by Her, *viz. Ann*, (now the Plaintiff *Ann Willes*) his Heir at Law, and no other Issue.

On the Death of *John Palmer*, his Widow *Ann*, under the Settlement, took Possession of that Part of the Estate which was limited to Her in Jointure; and continued in Possession thereof till her Death, which happened on the 27th of *December* 1764.

ARCHDALE PALMER, the Grantor, had married two Wives; and by the first, had Issue the said *John*, who died in his Life-time; *William*, who survived Him and was living at his Death; and several other Children, who died Infants, or without Issue: And by his second Wife, He had *Henry*, the present Claimant, and several other Children, who are living.

ARCHDALE PALMER, by his Will dated the 10th of December 1729, duly executed and attested so as to pass Freehold Estates, After mentioning in the Beginning of his Will, "that
 " as for such Worldly Estate which God hath been pleased to
 " bestow upon Him, He did thereby dispose of as follows;" and after reciting, that by a certain Settlement of Lands in *Wanlip* and elsewhere, upon the Marriage of his Eldest Son *John Palmer* deceased, certain Lands in *Wanlip* were conveyed to his Brother *Henry Palmer* and his (the Testator's) Son *Henry Palmer* their Executors Administrators and Assigns, for 300 Years, to commence immediately upon his (the Testator's) Death, In Trust, " by Sale or Mortgage of the said Term or otherwise, to raise 500*l.* and pay the same to such Person or
 " Persons as he (the Testator) by any Writing in his Life-time,
 " or by his last Will, should appoint;" He did direct and appoint, that the said *Henry Palmer* and *Henry Palmer* their Executors Administrators and Assigns should raise the Sum of 500*l.* by Sale or Mortgage of the said Term, or by any other Ways and Means as to them should seem meet; and pay the same, when raised, to his Executrix her Executors Administrators and Assigns, as Part of his Personal Estate therein after to Her given :

And then the Testator devised in these Words following—

AND WHEREAS by the Decease of my Eldest Son *John Palmer*, without leaving any Issue Male, *that Part* of my Estate at *Wanlip* which is now in my own Possession, is by the said Marriage-Settlement *vested in Me and my Heirs in Fee Simple*, subject to the said Term of 300 Years; I do hereby give and devise the said Estate, with all and singular the Appurtenances thereto belonging, to my Son *William Palmer*, for and during the Term of his Natural Life; and, after his Decease, to his 1st and 2d, and all and every other Son and Sons by him lawfully begotten or to be begotten, successively, as they shall be in Seniority of Age and Priority of Birth, and the Heirs Male of the Body and Bodies of such Son and Sons respectively issuing; and for want of such Issue, to the HEIRS MALE OF MY BODY begotten; And for want of such Issue, to *my own Right Heirs for ever*; Subject, nevertheless, to the Payment of the said Sum of 500*l.* and of such other Sums of Money as I shall hereafter charge upon the said Estate.

And the Testator then gives an Annuity of 50*l.* to *Elizabeth*, Wife of his Son *William*, for Life, to be issuing and payable (as He expresses it) out of the said Estate at *Wanlip* then in his own Possession, to be paid half yearly, at *Ladyday* and *Michaelmas*;
 the

the first Payment to be made on such of the said Feast-Days as should happen next after his Death ; with Powers of Entry and Distress, for recovering the same.

AND the Testator thereby devised his said Estate at *Wanlip* then in his own Possession, from and after the Expiration of the said Term of 300 Years, and the Raising the said 500*l.* to his Son *Thomas Palmer* (a Son by his the Testator's second Wife,) his Executors Administrators and Assigns, for a Term of 500 Years ; In Trust to raise and pay 1000*l.* to his two Grandsons, *Charlton Palmer* and *Henry Palmer* the two Sons of his (the Testator's) Son *William*, for their Advancement in the World.

But if it should happen that his (the Testator's) Son *William Palmer* should die before Him the Testator, whereby the Estate would come to his (the Testator's) Grandson *Charlton*; Then only the Sum of 500*l.* was to be raised and paid to the said Testator's Grandson *Henry*.

And he bequeathed all the Residue of his Goods and Chattels, Bonds and other Securities for Money and Personal Estate whatsoever, unto his said Wife *Ann Palmer*, to be disposed of by her amongst her Children ; and appointed Her Executrix.

ARCHDALE PALMER died on 4th September 1732, Leaving *Ann* his Widow and Executrix, and the said *Ann* the Widow of his said Son *John Palmer*, and the Plaintiff *Ann Wills* his Granddaughter and Heir at Law ; and also leaving his Son *William Palmer* surviving Him.

At the Death of *Archdale*, the said *William Palmer*, his second Son by his said first Wife, was Heir Male of his Body, and next Brother, of the whole Blood, to *John Palmer*.

William Palmer died in 1738, after the Death of *Archdale*, and without having suffered any Recovery ; having had two Sons *Charlton*, who died in 1736, before Him, without Issue ; and *Henry*, who died after Him, in July 1743, without having suffered any Recovery, and left a Son, *Henry-John Palmer*, who died an Infant, without Issue, in December 1762.

UPON the Death of *Henry-John*, the Defendant *Henry Palmer*, the Eldest Son and Heir Male of *Archdale Palmer*, by *Ann Charlton* his second Wife, entered upon that Part of the Estate in his Will mentioned to have vested in Him on the Death of

his Son *John* without Issue Male, and which was by *Archdale Palmer's* Will devised to the *Heirs Male of his Body*.

In December 1764, *Ann Palmer*, the Widow of *John*, died.

And upon her Death, HENRY PALMER, as *Heir Male of the Body of Archdale*, took Possession of the Manor Fishery and Lands which the said *Ann* held by way of Jointure for her Life.

The said *Ann Palmer* the Widow of *John Palmer* died, leaving the Plaintiff *Ann Wills* (then *Ann Norwood*) her only Daughter; and who is Heir of the Body of *John Palmer*, and Heir at Law of *John Palmer* her Father, of *Archdale* her Grandfather, and of *Henry John Palmer* her Cousin German; and who has Issue three Daughters by Mr. *William Norwood* her second Husband, to wit, *Ann* the Wife of *Thomas Hinde*, *Ellen* the Wife of *Thomas Emerton Westcombe Emerton*, and *Sujannah-Elizabeth Norwood* Spinster, an Infant.

In Hilary Term 1767, a Bill was brought by *Thomas Wills* and *Ann* and the other Plaintiffs, against the said *Henry Palmer* and the other Defendants: And by such Bill, the Plaintiffs *Thomas Wills* and *Ann* his Wife, in her Right, as She is Heir at Law and Heir of the Body of *John Palmer*, and Heir General of the Family, claimed, upon Failure of Issue Male of the whole Blood, to be intitled, by virtue of the Settlement, to the Reversion in Fee of that Part of the settled Estate of which the Reversion in Fee was limited by the Settlement to *John Palmer*; and likewise claimed as Heir at Law of *Archdale*, the Manor Advowson and Capital Messuage of *Wanlip*, and all the Estate of which the Reversion in Fee was limited to *Archdale*, as NOT DEVISED by his Will; and therefore prayed Issues at Law for Trying such Title; and to have Possession, and an Account of the Rents and Profits of the Estates.

The said Defendant HENRY PALMER by his Answer claimed the Estates first mentioned in the Settlement and comprised in the 500 Years Term, as HEIR MALE OF THE BODY of ARCHDALE, under the Limitations in the Settlement; and the Rest of the Estates, as HEIR MALE OF THE BODY of ARCHDALE, by virtue of the Devise in his Will.

On the 14th day of March 1769, on the Hearing of the Cause before the then Lord Chancellor, His Lordship Ordered That a Case should be made for the Opinion of the Judges of his Majesty's

Majesty's Court of King's Bench; and that the QUESTION should be,

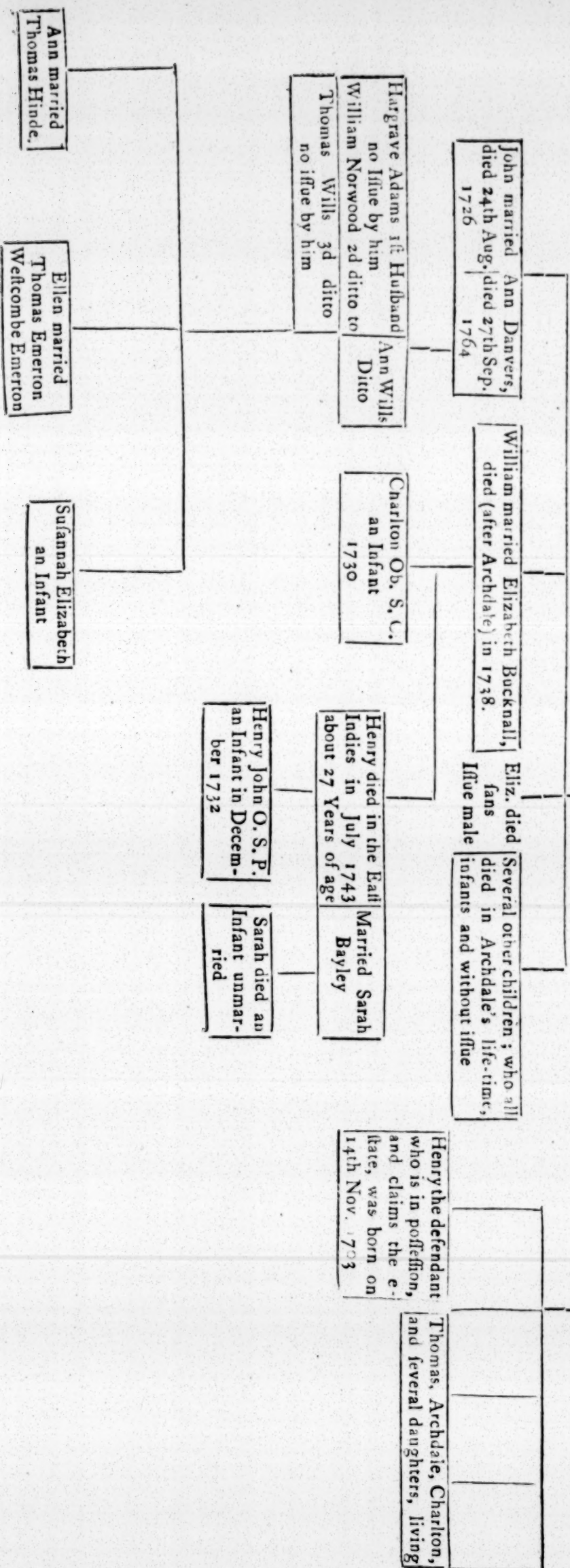
“ WHETHER *any* and *what* Estate passed by the said
“ INDENTURE dated the 15th day of May 1723, to the
“ Defendant HENRY PALMER, as HEIR MALE OF
“ THE BODY of ARCHDALE PALMER, the Grantor :”
And “ Whether *any* and *what* Estate passed to the
“ said Defendant HENRY PALMER, as HEIR MALE
“ OF THE BODY of the said ARCHDALE PALMER,
“ by his WILL dated the 10th day of December
“ 1729.”

pedigree.

Archdale Palmer
died September, 1732.

Mary Dawson 1st Wife
died 15th June, 1695.

2d Wife Ann Charlton married
19th December 1698, died 1764



This Case was argued on *Friday 11th May 1770*,
by Mr. Serjeant *Glynn* for the Plaintiffs and Mr.
Serjeant *Leigh* for the Defendants.

Serjeant *Glynn* argued that *Henry Palmer* could not take as a
PURCHASER. The first Taker, by Purchase, must be a *general*
Heir, the *Complete* Heir; not a *special* Heir.

The first Part of this Case turns upon a Limitation under a
Deed: The latter, upon a Limitation under a *Will*.

He owned, that in Cases upon *Wills*, the Rule had been broken
in upon; and a *Descriptio Personæ* has been holden to be within
the Intent of the Testator, and therefore allowed to be sufficient:
But on a *Deed*, the Rule has never been departed from, or shaken;
The Construction must be strict. And even upon *Wills*, it is only
a *clear* Intention, that can prevail: Whereas, in the present, Case
there is *no* such clear Intention.

The Case of *Browne v. Barkham** is distinguishable, he said, * Precedents
in Chancery,
442, 461.
and 1 Stra 35.
and 2 Vernon
729.
from the present Case. That was a Case of a *Trust*; and was
so considered by *Ld. Cowper*: But in Case of a *legal* Estate, the
Rule of Law that has so long prevailed and been taken for granted,
must be observed; *viz.* "that he who claims as Heir Male by
"*Purchase*, must be Heir as well as Heir Male." This was
expressly laid down by *Ld. Macclesfield*, in the Case of *Dawes v.*
Ferrers,† in *Easter Term 1722*. So that Both of them made a † 2 Peere
Williams. 1.
Precedents in
Chancery,
589.
Distinction between a legal Estate and a Trust Estate. And in
that Case of *Brown v. Barkham*, it was not meant that the Heir
General should take: She had a Sum of Money given to Her by
the Will, as an *Equivalent*. It was a Special Case; in which,
the *Intent* of the Testator was to take Effect. That Case can
not be reconciled to former Principles: And it has been since
contradicted.

[It would be too tedious, to enter into the Particulars of
these Cases, in this Place. Therefore I will refer the
Reader to the Case of *Brown v. Barkham*, as reported by
Sir *John Strange* and in the *Precedents in Chancery*; and
to the Case of *Dawes v. Ferrers*, as reported by Mr. *Peere*
Williams, Vol. 2. pa. 1. and likewise in *Precedents in*
Chancery, 589. He may also see all the Cases on this

Subject, collected together by Mr. *Viner*, in his 14th Vol. Title "Heir," Letter G. 3. Page 254 to 257; and in his 8th Vol. 317, 318. Title "Devile," an Account of the Bill of Review of the Case of *Brown v. Barkham*; with the State and Certificate of the Case of *Gwyn v. Hook*, in 1743: Which last Case was argued (as I find by my own Notes) first, in *Easter Term* 1743, and a second Time, in the *Michaelmas Term* following. I have the State of it, at full Length: But it is too long to insert here.]

The Serjeant concluded with denying that *Henry Palmer*, the Defendant, could take by *Descent*.

Mr. Serjeant *Leigh*, contra, for the Defendants, made two Questions: One was "Whether this Limitation is good in a *Deed*;" The Other, "Whether it be good in a *Will*."

1st. This was an Estate Tail executed in *Archdale Palmer*.

In *Pibus v. Mitford* (1 *Ventr.* 377. 378.) Ld. Ch. J. *Hale* held it to be an Estate Tail executed in *Michael*; because a Limitation "to the Heirs Male of his Body" is, in Construction of Law, a Limitation "to *Himself* and the Heirs Male of his Body." There is a great Difference, he said, when he who has the Use, limits it to *A.* for Life, the Remainder to the Heirs of the Body of *B.*: Here, no Estate can rise to *B.*; because Nothing moved from him. But where he who has the Estate, limits it to the Heirs Male of his *own* Body; *ut res valeat*, he shall have it *for his Life*.

Therefore it is not necessary that *Henry Palmer*, the Defendant, should take by *Purchase*, under this *Deed*.

2d. Then under the *Will*, there can be no Doubt upon the *Intent* of the Testator: He never intended that the Daughter of his Eldest son should take, whilst any Male Heirs remained.

He disputed the Rule of Law or Maxim laid down and insisted upon by Mr. Serjeant *Glynn*; and relied upon the Case of *Brown v. Barkham*, in which Ld. *Cowper* had examined every Case upon this Head. This pretended Maxim "that No One " can take by Purchase, as Heir Male, unless he be the *general* " Heir of the Family, as well as Heir Male," is neither agreeable to Common Sense, nor supportable by Argument. 'Tis true, that

that the Words "Heirs Male," alone, would not have been sufficient: but the Words "Heirs Male *of the Body*" are technical and complete. Where the Special Heir is properly and sufficiently described, he shall take.

And there is no Distinction between the Case of a Deed, and that of a Will. A Man can't *create* an Estate by Will, which could not be created by Deed. And Lord Cowper's Argument applies as much to a Deed, as to a Will.

He therefore concluded, that *Henry Palmer*, the Defendant, took both under the *Deed* and under the *Will*.

Mr. Serjeant GLYNN agreed to a resulting Use in a Grantor; so that a Grantor would have an Estate for Life, which would unite within his Estate Tail. But that Principle of Law does not apply, he said, to the Case now before the Court; Because, in the present Case there are *two* Grantors. *Archdale Palmer* was not the *only* Grantor: And therefore the Use could not result to *Him ALONE*.

He then defended his Maxim; urged its having been established by long Time and Usage; and said, it had never been denied; those Cases which were holden not to be within it, having gone upon particular Circumstances and Exceptions.

And he insisted that the Construction upon *Deeds* ought to be quite *strict*; though a greater Latitude had been allowed upon Wills, and that a *clear Intention*, if it appeared, might prevail, upon a Will: Which clear Intention he denied to be apparent in the present Case.

About a Week after this Argument, The Judges gave their Certificate in the Words following—

Having heard Counsel on both Sides, and considered this Case, we are of Opinion, that the Defendant *Henry Palmer*, by the *Indenture* dated 15th May 1723, took by DESCENT, as Heir Male of the Body of *Archdale Palmer*, the Grantor.

In case a *third Person* had been the Grantor, We should have thought that *Henry Palmer* would have taken an Estate in Tail Male by PURCHASE, under the Description of "Heir Male of the Body of *Archdale Palmer*."

And

And we are of Opinion, that an Estate in Tail Male passed to the Defendant *Henry Palmer*, as Heir Male of the Body of the said *Archdale Palmer*, by his *Will* dated the 10th Day of *December* 1729.

MANSFIELD.
E. WILLES.
W. BLACKSTONE.

17th May 1770.

V. post. *Goodtitle, ex dimiss' Weston,*
v. *Burtonshaw and Wood.* 1772. 12 G. 3. B. R.

Friday,
18th May
1770.

Quantock and Others, Assignees of George England,
a Bankrupt, against Robert England.

THIS was a Special Case reserved at the last Lent-Assizes for the County of *Somerset*, holden before Mr. Justice *Bathurst* and Mr. Justice *Willes*.

A Verdict was found for the Plaintiffs; Damages, 90 *l.* Costs 40 *s.* Subject to the Opinion of this Court, on a Case very particularly stated, but not necessary to be here specified; because the Question lay within a very narrow Compass. For, the Money recovered was clearly due from the Defendant to the Bankrupt. The only Objection was to the *Validity of the Commission*; because the Debts of the petitioning Creditors were of *above six Years* Standing, before the Suing out of the Commission; and there was no Evidence of any Acknowledgement or New Promise *within* the six Years. It was stated, "that the Bankrupt *appeared*, and was *examined* by the Commissioners under the *Commission*; And was by them declared a Bankrupt."

This Case was argued by Mr. *Mansfield*, for the Plaintiffs; and Mr. *Impey* (now Sir *Elijah Impey*,) for the Defendants: And the only Question was "Whether the petitioning Creditors were not precluded from applying for the Commission of Bankruptcy, by reason of the *six Years* which had incurred between the Original Cause of their Debt, and the Time of their applying for the Commission."

Mr. *Mansfield* argued, That these six Years being elapsed was no Objection against the Application for a Commission of Bankruptcy

Bankruptcy by the petitioning Creditors. The Statute relating to Bankrupts, 5 G. 2. c. 30. § 23. does not meddle with the *Recency* of the petitioning Creditor's Debt: It only requires the *Truth* of it, "that it be *really due*." And the Statute of Limitations (21 Jac. 1. c. 16. § 3.) relates only to the Time of bringing *Actions*: It does not limit the Time of applying for a *Commission of Bankruptcy*. The Debt remains a *subsisting Debt*: It is not extinguished. The Statute of Limitations only affects the *Remedy*: It only limits the Time of bringing the *Action*. If the Debtor does not insist upon the Statute of Limitations, he will be obliged to pay it. And here, the Bankrupt himself makes no Objection to it: He has *submitted* to the Commission, and *acquiesced* under it. After which, it does not lie in the Mouth of a third Person, to make this Objection. However, there is *no* Time limited for taking out a Commission of Bankruptcy: And when a Commission has issued, Such old Debts may be proved under it. There was a Case before Ld. Ch. Justice *Eyre*, at *Guildhall*, in *Hilary Term* 13 G. 1. *Swayne et al' v. Wallinger*, reported in 2 *Str.* 746. where a Commission of Bankruptcy issued in 1726; And the Debt of the petitioning Creditor appeared to be a promissory Note in 1714: The Chief Justice allowed it to be good; saying, that "though six Years were past, he " could not *presume* it to be barred."

Mr. *Impey*, *contra*, for the Defendants, argued That by the *Construction* of the Statute of Limitations and of the Bankrupt Acts, a Creditor who had suffered six Years to elapse, was precluded from applying for a Commission. He did not assert or even intimate that the *Words* of these Statutes extended them so far: But he said that it was within the Intent and Spirit of the Statute of Limitations; which meant equally to bar all concurrent Jurisdictions. And it might here be taken Advantage of, He said, in Evidence, upon the General Issue. He mentioned the anonymous Case in 1 *Salk.* 278. *pl.* 1. but chiefly relied on *Hosley's* Case in Chancery in the Year 1728, after *Trinity Term*; where the then Lord Chancellor superseded the Commission, because the Debt of the petitioning Creditor was of more than six Years Standing. He cited this Case from *Moseley's Reports* 87; (which Book Lord *Mansfield* told him he should not have quoted :) But he also produced a Copy of the Order, from the Register's Book.

Mr. *Mansfield*, in Reply, not only denied that this could be given in Evidence, upon the General Issue pleaded; but also denied that the Matter itself is any legal Ground of Objection.

As to the Case cited from a Book called *Moseley's Reports*—He owned, he had never seen such a Book.

LORD MANSFIELD—The Order, in that Case, is *general*, “to supersede the Commission, upon the *Whole Complaint* :” *No particular Ground* is shewn.

It is settled, “that the Statute of Limitations does *not* “*destroy the Debt* :” It only takes away the *Remedy*. The Debtor may either take Advantage of the Statute of Limitations, if the Debt be older than the Time limited for bringing the Action; Or he may wave this Advantage: And, in *Honesty*, he ought not to defend himself by such a Plea. And the slightest Word of Acknowledgement will take it out of the Statute. Here, the Debtor himself has not Objected: He has submitted to the Commission, and been examined under it. Therefore the Objection does not now lie in the Mouth of a third Person.

I don't think that *Horsey's* Case is an Authority; in as much as no particular Ground appears, for the Superfeding of the Commission. But the Case of *Swayne and Wallinger* is in point: For, though the promissory Note, which was the Debt of the petitioning Creditor, was of above six Years standing, yet *Ld. Ch. J. Eyre* allowed it to be good; saying, “he could not presume it to be barred.”

THE OTHER THREE JUDGES, Mr. Justice ASTON, Mr. Justice WILLES, and Mr. Justice BLACKSTONE concurred with the Chief Justice, That this Objection lay only in the Mouth of the *Bankrupt* himself; That he had *waved* it by appearing and submitting to the Commission, and being examined under it; And that, as the Debt still subsisted, (though the Remedy was taken away,) this was such an Acknowledgement of it, as put it out of the Power of a third Person to make the Objection.

THE COURT therefore unanimously ordered

That the *POSTEA* be delivered to the PLAINTIFFS.

Martyn

Martyn v. Podger and Others.

Wednesday
23 May
1770.

THIS Case stood in the Civil Paper of *Tuesday* 15th *May* 1770, for Argument; and was then argued by Serjeant *Heath* for the Plaintiff, and Mr. *Mansfield* for the Defendant, upon the single Question “Whether it was necessary for the Defendants, who “justified under a *Fieri facias*, to produce and prove a Copy “of the Judgment upon which the Writ was grounded.”

The Case stated, for the Opinion of the Court, was in the following Words—

John Martyn, Plaintiff, against *John Podger*, *Samuel Sherland*, and *Edward Manley*, Defendants.

Devonshire. **T**HIS was an Action of Trespass brought against the Defendants, for seizing taking and carrying away divers Goods and Chattels of the Plaintiff particularly mentioned in the Declaration, and for converting and disposing thereof to their own Use; To Plaintiff's Damage 100 *l*. To this Declaration, the Defendants pleaded “Not Guilty:” And upon the Trial of the Issue, the following Facts were proved.

That the several Goods and Chattels mentioned in the Declaration *had been* the Goods and Chattels of *William Martyn* the Son of the Plaintiff.

That the said *William Martyn*, on the 20th of *June* 1768, having made a BILL OF SALE of all his Household Goods, to the Plaintiff, his Father, amongst which, were the Goods and Chattels mentioned in the Declaration, (which Bill of Sale was FRAUDULENT against Creditors,) was arrested on the 19th of *July* 1768, at the Suit of One *Henry Bryant*, for a Debt of 31 *l*. 10 *s*. and carried to Gaol, on the said Arrest.

That the Defendants produced in Evidence, upon this Trial, a Writ of *Fieri facias* issued out of this Court on the 27th of *July* 1768, against the said *William Martyn* at the Suit of *Hugh Pullin*, directed to the Sheriff of *Devonshire*, Commanding Him to cause to be made, of the Goods and Chattels of the said *William Martyn* in his Bailiwick, as well a Debt of 320 *l*. which
the

the said *Hugh Pullin* had recovered against the said *William Martyn*, as also Sixty-three Shillings which had been adjudged to the said *Hugh Pullin* for his Damages which he had sustained as well by Occasion of the detaining that Debt, as for as his Costs and Charges by Him about his Suit in that Behalf expended, whereof the said *William Martyn* has been Convicted; As by the Record and Proceedings thereof remaining in the Court of our Lord the King before the King Himself at *Westminster*, manifestly appeared: And that the Sheriff should have those Monies before our said Lord the King at *Westminster*, on *Monday* next after the Morrow of all Souls, to render to the said *Hugh Pullin* for the Debt and Damages aforesaid.

That the said Sheriff afterwards made his Warrant, directed to the Defendant *Edward Manley*, One of his Bailiffs, to execute the said Writ: And the said *Edward Manley*, taking to his Assistance the other two Defendants, did, by virtue of the said Writ and Warrant, seize and take in Execution the Goods and Chattels mentioned in the said Declaration, *as and for* the Goods and Chattels of the said *William Martyn*, and which were then remaining in the said *William Martyn's* House.

At the Trial of this Cause, no Copy of the Judgment upon which the said Writ was grounded, was given in Evidence: For WANT whereof, a Verdict upon the Trial was found for the Plaintiff, with 28*l.* Damages; Subject to the Opinion of the Court upon the following Question—

“ Whether, in this Case, it were necessary for the Defendants, being SHERIFFS OFFICERS, upon the Trial of this Cause to produce and prove a COPY of the JUDGMENT upon which the said Writ of of *Fieri facias* issued.”

The Serjeant cited the Case of *Lake v. Billers et al'*. in 1 *Lord Raym.* 733, as in point for the Plaintiff. That was in Trespass brought against the Sheriff, for Goods taken. Upon “ Not Guilty” pleaded, the Sheriff gave in Evidence, “ that he levied them in Execution, by virtue of a *Fieri facias*.” The Plaintiff made Title to the Goods by a prior Execution, but fraudulent; and by Bill of Sale made of them to him by the Officer, (*viz.* the Sheriff Predecessor to the Defendant.) And upon the Trial before *Holt* Chief Justice, it was ruled by him, after Argument of the Counsel of both Sides, “ that the Defendant, though Sheriff, ought to give in Evidence a Copy of the Judgment.” But it would have been otherwise, if the Trespass been brought by the Person against whom the *Fieri facias* issued.

LORD MANSFIELD—That Case proves, “that, as the “Action is brought by a Stranger, the Judgment must be proved:” And the general Apprehension is, “that it is necessary to produce “a Copy of the Judgment.” And the Rest of the Court concurred with his Lordship in this Opinion.

BUT THE WHOLE COURT were likewise of Opinion, that this Recovery in this Action brought by the Father upon a fraudulent Bill of Sale, merely colourable, not a real fair Transaction, but leaving the Possession in the Son, and fraudulent even at Common Law independent of the Statute of 13 *Eliz.* c. 5. § 2. was shamefull, unreasonable, and against Justice; and that the Verdict ought not to stand. It might have been left to the Jury, “Whether the Plaintiff was *in Possession* of the Goods, “or not.” It was a Matter fit to be left to a Jury. But it is a shameful Thing, to set up this fraudulent colourable Bill of Sale, as a real Conveyance of the Property.

They thought, therefore, that the Defendants might be at Liberty to move for a *New Trial*.

Mr. *Mansfield* accordingly moved for a New Trial; and obtained a Rule to shew Cause.

Serjeant *Heath* now shewed Cause.

LORD MANSFIELD—The Bailiffs are only nominal: The Plaintiff in the original Action, *Hugh Pullin*, is to be considered as the Creditor of *William Martyn*, the Son of the present Plaintiff.

The Copy of the Judgment ought to have been produced.

But the Verdict arises from a Slip and Inadvertence: It is against Law and Justice. The Plaintiff has no Merits. The Bill of Sale was fraudulent: The Son remained in Possession. The Recovery is manifestly contrary to Reason and Justice.

* Mr. Justice
Aston was
now in Chan-
cery.

Therefore HIS LORDSHIP and the * COURT were unanimous, that there should be

A NEW TRIAL, on Payment of Costs.

Saturday 26th
May 1772.

Rex versus Inhabitants of Witney.

MR. Serjeant *Davy*, Mr. *Lucas*, and Mr. *Dandridge*, shewed Cause against quashing an Order of Sessions made for quashing a *Poors Rate*.

Mr. *Chambre* had obtained the Rule for shewing Cause why this Order of Sessions should not be quashed.

The Order originally sent up hither in Return to the *Certiorari* was afterwards altered by Consent of the Counsel on both Sides; And a New one was, by the like Consent, substituted instead of it. This was done under the following Rule—" *Rex v. Inhabitants of Witney in Oxfordshire*—By Consent of Counsel on both Sides, It is ordered, That the Order agreed to by the Prosecutor and Defendants in this Cause, and now produced to this Court, be accepted, and annexed to the Writ of *Certiorari* issued in this Cause, in the Room and Stead of the Order returned with the said Writ of *Certiorari*. On the Motion of Mr. Solicitor General, for the Defendants: By Consent of Mr. Serjeant *Davy*, for the Prosecutor." This Rule was made on *Wednesday* next after the Morrow of the Purification, 10 G. 3. (which was last Term.)

The Order originally sent up was as follows—

Oxfordshire—Trinity Sessions. 8^o, G. 3.

Upon the Appeal made to this Court, by *Henry Dorne*, and others, against a *Poor's Rate* made the 22d Day of *May* 1768, for the Relief of the Poor of the Parish of *Witney* in this County, it is Ordered by the Court That the said Appeal be and is hereby quashed; Subject to the Opinion of the Court of *King's Bench*, upon a Case to be stated by Counsel.

The Case, as it stood *at first*, was this—

That there are in the Town of *Witney*, and long have been many *Manufacturers* employed in the making of Blankets, and other *Traders*, who employ under them a great Number of Servants and Apprentices. That the said *Manufacturers* and *Traders* have been constantly assessed to the *Land* tax for their respective *Stocks in Trade*; but have never been charged with the Payment of any Rate for the Relief of the *Poor*, on Account of *such Stock*.

I

That

That *Lands and Houses* within the said Town have been and are constantly assessed to the Relief of the *Poor*, as well as to the *Land* tax. And that the Overseers and Churchwardens of the Burrough of *Witney* have generally been *Traders*: but that there have been Instances of the contrary.

The Questions submitted to the Opinion of the Court of *King's Bench* are,—

1st. Whether the *STOCK employed in Trade* by a *Manufacturer*, or any other *STOCK IN TRADE* of a *Manufacturer*, shall be rated to the *POOR*-tax.

2d. Whether the *STOCK IN TRADE* of any OTHER *Trader* shall be rated to the *POOR*-tax.

The New Order and State of the Case, substituted (by Consent) instead of it,—was as follows—

Upon the Appeal of *Henry Dorne* and Others, against a Rate made 22d *May* 1768, for the Relief of the *Poor* of the Parish of *Witney* in the County of *Oxford*, The Cause of Appeal was forthat there were within the said Parish many *Manufacturers of Blankets* and other *Traders* who employ under them many *Servants and Apprentices*: And such *Manufactures and Traders* were not assessed in the said Rate, for their *STOCKS IN TRADE*. And for that Reason only, the said Rate was quashed;—The Court of Sessions conceiving itself bound to quash the Rate on Account of the Omission of such *Stock in Trade* in the said Rate: Subject however to the Opinion of the Court of *King's Bench* on the following Facts.

IT APPEARED and was ADMITTED that there have long been many such *Manufacturers and Traders* within the said Parish, who have been constantly assessed to the *Land*-tax, for their respective *Stock in Trade*; but None of Whom have ever been charged with the Payment of any Rate for the Relief of the *Poor*; on Account of such *STOCKS*. That as well the said *Manufacturers and Traders*, as all other Occupiers of *Lands and Houses* within the said Parish, have been and are constantly assessed, in this and all former Rates for the Relief of the *Poor*, as well as to the *Land*-tax, for the *Lands and Houses* in their respective *Occupations*: And that the *Churchwardens and Overseers* of the said Parish have been generally, though not always *Traders*.

The

The Counsel who argued in Support of the Order of Sessions cited and relied upon a Case reported in 2 *Ld. Raym.* 1280. The Queen against the Inhabitants of *Barkin*, *H. 5 Ann.* 1706; where it was ruled "that a Farmer *non erit onerabilis & taxabilis ad ratas pauperum pro pecuniis, anglicè Stock; et quòd Artifex, anglicè a Tradesman, est onerabilis et taxabilis pro pecuniis, anglicè Stock, in Arte, Anglicè Trade.*" This Resolution, they said, is expressly in Point "that a Tradesman is chargeable to the Poors Rate, for his Stock in Trade."

But THE COURT were not satisfied of the Authority of this Case cited from *Lord Raymond*: *Lord Mansfield* expressly called it a "strange Note." They observed, that the Opinion of the three Judges, *Powell*, *Powys*, and *Gould*, was only said to be "That a *Farmer*, for his Stock, was not taxable;" contrary to the Opinion of *Holt* Chief Justice. But it does not appear that a Question was directly put to them, "Whether a *Tradesman* was taxable to the Poor, for his Stock in Trade. It was also mentioned, that 2 *Salk.* 452. which is referred to (in the Margin of *Lord Raymond*) as the same Case, takes no Notice at all, of this Point. But that was *another Branch* of the Case; and of a preceding Term, namely *Pasch. 5^o Ann.* The Court, however, gave no explicit Opinion upon the Merits of the present Case; though they seemed very far from allowing that a Tradesman is rateable to the Poor, for his Stock in Trade.

Whatever may be the future Determination of that Point, whenever it shall come regularly before the Court, They held it improper and inconvenient for them to enter into the Discussion of it upon the Sessions Order as it now stands. It would make great Confusion, if the Court were to give *general* Opinions, upon vague States of Cases: They are to judge upon the Case before them; and their Judgment ought to go no further than the Case stated to them goes. Whereas they are here asking a general Opinion, without any particular Case stated. They ask—"Is Stock in Trade rateable to the Poor-tax?" They ask us this general Question; without stating "What is Stock in Trade;" or, "What it is that the Rate has taxed;" or "Whether these People have any Stock in Trade;" "or what that Stock in Trade is;" nor any particular Description of what Trade is meant." The State of the Case is quite imperfect and vague.

This Order of Sessions is clearly wrong, upon the Face of it; and ought to be quashed, as an improper One. They have laid it

it down as a Principle, "that Stock in Trade ought to be rated "to the Poor." But if that Point had been clear, Yet upon quashing the whole Old Rate, a New One ought to have been made; and such particular Persons put upon it, as appeared to have such Stock in Trade, according to the respective Stock in Trade which they had, and for such their Stock in Trade, (particularizing how much it was.) Such Persons as had been injured by being overcharged, should have been relieved; And those who were improperly omitted should have been put on, and properly charged: And then, if any Person had found himself aggrieved, or had any Objection to any Person being put on or left out, or to the Sum charged, he might have appealed. [See 17 G. 2. c. 38. § 4.] Whereas, here, they have not exercised their judicial Capacity in the manner they ought to have done:

PER CUR' unanimously, ORDERED that the Order of Sessions made for quashing the Rate, upon an Appeal made by *Henry Dorne* and Others, against a Poors Rate made for the Relief of the Poor of the Parish of *Witney* in the County of *Oxford*, be quashed for the Insufficiency thereof.

See this Point about Stock in Trade being rateable to the Poor, discussed in the Case of *Rex v. Guardians of the Poor of the City of Canterbury*, in my 4th Volume, pa. 2291, And See the two Notes at the End of that Case, pa. 2294, and 2295; particularly the latter, referring to the Case of *Ringwood* on 28th June 1775.

The End of *Easter Term* 1770, 10^o. G. 3.

Trinity Term

10 Geo. 3. B. R. 1770.

On *Friday 22d June 1770*, *William Henry Ashburst* of the *Inner Temple Esq*; kissed Hands, upon being appointed a Judge of this Court; On *Monday* following, the 25th, he took his Leave of that Society, and went out Serjeant; and the next day, *Tuesday* the 26th, he took his Seat upon the Bench.

The Vacancy was occasioned by the Death of Mr. Justice *Yates*, then One of the Judges of the *Common Pleas*, who died on the 7th of the same Month of *June 1770*: Upon whose Death, Mr. Justice *Blackstone* removed from this Bench into the *Common Pleas*; Which he was always understood to have had in View, whenever Opportunity should offer.

Tuesday 26th June 1770. Roe, on the several Demises of *Thomas Urry* and *Elizabeth Haldane*, v. *Harvey*.

THIS Case (mentioned before, in Page 2484,) now came on upon a Special Verdict; and was argued by Mr. *Mansfield*, for Mrs. *Haldane*, the Widow and Devisee; and by Mr. *Popham* for the Defendant, the Heir at Law.

The Land in Question was the only real Estate the Testator had. He devised "All the Rest and Residue of his Estate, what-

“ whatsoever and wheresoever, to his dear and loving Wife
“ *Elizabeth*, her Heirs Executors and Administrators.”

Mr. *Popham* endeavoured to shew that the Term “ Estate”
“ does not necessarily mean *real* Estate.

But LORD MANSFIELD answered him, that the Word
“ Estate” carries every thing; unless tied down by particular
Expressions.

Mr. Justice WILLES and Mr. Justice ASHHURST
concurred.

(Mr. Justice ASTON was sitting in Chancery.)

Judgment for the PLAINTIFF.

Burrough, Widow, *versus* Skinner.

THE Defendant was an *Auctioneer*; and, in that Character,
had sold to the Plaintiff an Interest in Land, for which
the Plaintiff had paid him a *Deposit* of 50*l.* but, upon an Objection
to the Title, and the Want of Disclosure of certain Circumstances
which ought to have been disclosed at the Time of the Bidding,
the Plaintiff (the Purchaser) declined going on with the Contract:
And, in the Opinion of the Court, She had sufficient Reason for
so doing. She therefore required the Auctioneer to pay Her back
his Deposit of 50*l.* The Auctioneer refused. Whereupon, the Bid-
der brought this Action against him, to recover it. The Auction-
eer paid 8*l.* into Court. The Cause was tried: And the Plain-
tiff obtained a Verdict. The Auctioneer moved for a New
Trial; and had a Rule to shew Cause.

But, upon shewing Cause,

THE COURT were clear, that the Action lay against
the Auctioneer. The Money does not appear to have been paid
over by him to his Principal. But if it had been so, yet the
Objection appears to have been made before it either was or
ought to have been so paid over. He was a Stake-holder, a mere
Depositary of the 50*l.* and ought not to have parted with
it, till such Time as the Sale should be finished and comple-
ted,

ted, and it should appear in the Event to whom it properly belonged.

They also thought that the Auctioneer had acknowledged himself to be liable to the Action, by paying Money into Court.

They therefore * unanimously discharged the Rule for shewing Cause why there should not be a New Trial.

* Mr. Justice ASTON was not present; being engaged in the Court of Chancery, as One of the Lords Commissioners.

Monday 2d
July 1770.

Rex *versus* Thomas Dunn.

THE Defendant was brought up, on *Saturday* last, the 30th of *June*, from *Maidstone* Gaol, by a *Habeas Corpus*: To which the following Commitment was returned.

K E N T — T O all and every the Constables and other to wit— Officers of the Peace for the said County, whom these may concern; and to the Keeper of his Majesty's Gaol at *Maidstone* in the said County—

These are, in his Majesty's Name, to command you and any of you the said Officers, forthwith, safely to convey and deliver into the Custody of the said Keeper, the Body of *Thomas Dunn*, being charged before Me, One of his Majesty's Justices of the Peace in and for the said County, by the Oath of *John Thomas*, One of the Officers of his Majesty's Customs, for *forcibly resisting, binding, affronting, abusing, beating and wounding him in the Execution of his Office*, on the 11th Instant, in the Parish of *St. Paul Deptford* in the said County, to the Hazard of his Life; the said *Thomas Dunn* being then, with others, armed with *offensive Weapons*, to wit, *Clubs*; whereby some prohibited and uncustomed Goods were forcibly carried and conveyed away by the said *Thomas Dunn* and Others, after they had been seized by the said *John Thomas*. And you the said Keeper are hereby required to receive the said *Thomas Dunn* into your said Prison, and him safely *there to keep* UNTIL THE NEXT QUARTER SESSIONS. And for your so doing, This shall be to You and Every of You a sufficient Warrant. Given under my Hand and Seal, this 26th Day of *May* 1770.

This

This Commitment was founded upon 13, 14 C. 2. c. 11. § 6. which enacts “ that where any Officer or Officers shall be by any
 “ Person or Persons armed with *Clubs or any manner of Weapon*,
 “ forcibly hindered affronted abused beaten or wounded as afore-
 “ said, either on board any Ship or Vessel, or upon the Land
 “ or Water, in the due Execution of their Office, All and Every
 “ Person or Persons so resisting affronting abusing beating or
 “ wounding the said Officer or Officers or their Deputies, or
 “ such as shall act in their Aid or Assistance, shall, by the next
 “ Justice of Peace or other Magistrate, be committed to Prison,
 “ THERE TO REMAIN TILL NEXT QUARTER SESSIONS. And
 “ the Justices of Peace of the said Quarter-Sessions shall and
 “ are hereby impowered to punish the Offender by *Fine*, not
 “ exceeding 100 *l*. And the Offender is to remain in Prison till
 “ he be discharged by Order of the *Exchequer*, both of the Fine
 “ and of the Imprisonment, or discover the Person that set
 “ him to Work; to the End he may be legally proceeded a-
 “ gainst.”

The only Question was “ Whether the Defendant was
 “ *bailable*, or not.”

It was thought, at first, that this Matter had never come in question before. But a Case was afterwards mentioned, which I find amongst my Notes: And it is as follows.

The Name of it was *Rex v. Walter*: The Time, *Hilary 1741*, 15 G. 2. It was a Commitment upon this same Act of Parliament; a *Habeas Corpus* brought; and Exceptions taken by the then Mr. *Denison*; the Defendant afterwards charged with a new and better Commitment, which was nevertheless objected to: But Mr. *Denison* insisted, that even admitting it to be a good One, yet the Defendant ought to be admitted to *Bail* till the next Quarter-Sessions. It was adjourned; and the Man brought up again. Sir *Dudley Rider*, then Attorney General, argued, that the Defendant could *not* be bailed: So also did Sir *John Strange*, then Solicitor General. The Judges discussed the Point; but, in the End, were desirous to consider it more fully, and to have it further spoken to. However, as good Bail was offered, the Attorney and Solicitor General consented to take Bail. But the Court took particular Notice, “ that it was done *by Consent*,” and expressly declared it to be “ *without Prejudice to the Question*.” (So that it does, in Effect, stand as a Matter that never has before come in question; at least, as far as this cited Case is concerned.)

THE COURT did not now declare any Opinion; but only ordered the Defendant to be brought up again on *Monday*.

And being now brought up accordingly,

• Mr. Justice
Aston was ab-
sent in Chan-
cery.

THE COURT * were unanimously of Opinion to *remand* him. They observed, that this was *not* an Application to their *Discretion*; but a *Demand* to be bailed, as of *Right*. And they were clear, that a Person committed under 13, 14 C. 2. c. 11. § 6. *till* the next Quarter-Sessions, could not claim to be bailed, as a *Right*: For that the Letter and Meaning of this Act of Parliament were, Both of them, plain and manifest, "that the Offender should remain in Prison, *in actual Custody*, till the next Quarter-Sessions." It was not necessary to use the technical Terms "without Bail or Mainprize:" The Import of the Words used in the Act is sufficiently plain.

N. B. This Offence has increased so much, that the Legislature have been since obliged to follow it with severer Punishment: See 9 G. 2. c. 35. § 10.

The End of *Trinity* Term 1770, 10 Geo. 3.

Michaelmas

Michaelmas Term

11 Geo. 3. B. R. 1770.

Bigby, Widow, against Matthew Kennedy and Patrick Kennedy. Tuesday 6th
Nov. 1770.

The following Case of *Bigby* against the two *Kennedys* is of so *peculiar a Nature*, and upon a Subject which occurs *so very seldom*, that I have been intentionally very minute and circumstantial in describing the *Method and Form of proceeding* in it; As I conceive that it may not only be an Amusement to the *Curiosity* of Some Readers, but may also be usefull as a *precedent*, and save the Trouble of searching into Rule-books and Records, whenever a future Appeal shall happen to be brought; Especially, as this was an Appeal against two different Persons, who were brought into Court at *different Times* and from *different Custodies*

I hope this may serve as an Apology for the *Length* of this Case. In the Progress of this Volume, I propose to avoid Tedioufness in reporting the particular Cases; as well as totally to omit such as may seem not worth reporting.

THIS was an Appeal of Death, brought by the Widow of the Person killed.

As it is only a Vindictive *Action*, the Proceedings are on the *Civil Side* of the Court, and not on the Criminal; though the Defendants are pursued not only criminally, but even *capitally*.

Appeals are also *local Actions*; and may be commenced either by *Writ*, (an Original out of Chancery, returnable in this Court;) or by Bill, if the Defendant be in actual Custody, or Bail filed. *Smith v. Bowen. P. 8 Ann. 11 Mod. 216, 217.* (The Record

Record is penes Mr. Benton : It was returned by *Certiorari*, on the Civil Side.) *Reeves v. Trindle* P. 2 G. 1. B. R. *Comyns*, 257. *Castel v. Bambridge and Corbet*. M. & H. 3 G. 2. B. R. *Pyle v. Grant*. M. 1729, 3 G. 2. B. R. *Parry v. Nichols*, M. 1730, 3 G. 2. B. R. The Appeal against *Lisle* for the Murder of *Armstrong* was by Bill, at the Assizes. The whole Proceeding was entered upon the Record of the Indictment, together with the Conviction of Manlaughter, and returned into this Court upon a *Certiorari**: And the Appeal was also returned; but upon the Record of that, no Mention was made of any Proceeding. *Lisle* was also brought up to the Bar, by *Habeas Corpus*. He was bailed generally, on the Crown-Side, "to appear *de Die in Diem*." Sir Samuel Astrey, Clerk of the Crown, officiated in the Matter of his praying his Clergy. The Appellant afterwards appearing, the Appeal was arraigned in French, by the Appellant's Counsel. And the Clerk of the Crown going to arraign him likewise, it was objected "that the Appeal was discontinued." This Objection being over-ruled, it was then questioned "on which Side the Appeal should be arraigned." *Et per Curiam*, A Civil Cause is always on the Plea Side, unless it come in by Attachment. And Mr. Aston said, "Appeal, whether by Writ or Bill, was always arraigned in English, on the Plea-Side; unless it came in by *Certiorari*: For, then it was on the Crown-Side." Accordingly it was ruled in that Case; but not to make a Precedent. 1 Salk. 60, 61, 62. The same Case is reported in *Skinner* 671. *Carthew* 394. 12 Mod. 109, & 157. *Comberbach* 410 411. and *Keyling* 89 to 108. very much at large: But Nothing appears in those Reports relating to the Form of the Proceeding; only that *Comberbach* mentions that Sir Samuel Astrey demanded of the Prisoner "What &c:" Whereupon he prayed the Benefit of his Clergy. And this seems to have been properly within Sir Samuel Astrey's Province; though none of the Civil Part of the Business might be so. The Form of the Bill itself is quite a Civil Proceeding. And the Entry of *Armstrong v. Lisle* is on the Plea-Side, upon a Roll of Michaelmas Term 8^o. W. 3. No. 561. It may be seen at full Length in *Tremain's Pleas of the Crown*, pa. 20 to 27. Where see also the Entries of *Goreing v. Deering*, M. 1. J. 2. pa. 15 to 20. and *Orbell, Vid. v. Ward*, H. 3. 4. J. 2. pa. 27 to 29. and *Killegrew v. Vincent*, Trin. 4 J. 2. pa. 29 to 32. all of them, Appeals of Murder. The three Cases of *Castel v. Bambridge and Corbet*, and *Pyle v. Grant*, and *Parry v. Nichols*, happened almost within the same Year, and were all of them prior to the Act of Parliament of 4 G. 2. c. 26. "that all Proceedings in Courts of Justice should be in the English Language." I was present at them all; and, for Curiosity, will mention the Form of arraigning the Appeal. In the first of them, Mr. Filmer, Counsel for the Appellant, arraigned it in

Law-French; and then Mr. *Clarke*, the Secondary on the Civil Side, read it in *English*. In the second, the Appellant's Counsel first read it in Law-French; and Mr. *Clarke*, the Secondary on the Civil Side, read it in Latin. In the Third Case, Lord *Raymond*, then Chief Justice, said that the right Way was for the Master on the Civil Side to read the Appeal in Latin; and afterwards in English, if the Appellee desires it.

As this Sort of Action is so singular and so uncommon, and has not occurred for almost half a Century, I was willing to preserve the Memory of what I have abovementioned; and will now proceed with the present Case.

It first came before the Court upon *Monday* the 21st of *May* 1770.

Mr. *Walker*, on Behalf of the Prosecutrix, moved for a Writ of *Certiorari* to be directed to the Justices of our Lord the King assigned to deliver the Gaol of *Newgate* in and for the County of *Middlesex* of the Prisoners therein being, at Justice-Hall in the *Old Bailey* in the Suburbs of the City of *London*, to remove into this Court all and singular Appeals of whatever Felonies and Murders whereof *Matthew Kennedy* and *Patrick Kennedy* are appealed before them.

LORD MANSFIELD—Take your *Certiorari*. But We give no particular Directions about it: You must conduct Yourselfs as You shall be advised.*

* The Occasion of his Lordship's adding these Words was a Doubt that had arisen on *Saturday* last, "Whether there was not a Difference between a *Certiorari* to remove a *Bill* of Appeal into this Court, and a *Writ* of Appeal returnable in it; as to the Side of the Court on which the Rule should be taken. Lord *Mansfield* was not then in Court: But he now declared his Opinion that the Parties were, at their Peril, to make their Application properly; and that neither the Court nor the Officers of it should interfere in directing them.

On *Friday* 25th *May* 1770,

The Defendant *Matthew Kennedy* was brought into Court by *Habeas Corpus* directed to the Sheriff of *Kent*, and also to the Keeper of *Maidstone* Gaol.

It was an *Original Writ out of Chancery*, bearing *Tesle* on the 30th of *April* 10^o G. 3. reciting “ Forasmuch as *Ann Bigby*,
 “ *Widow*, who was the *Wife* of *John Bigby* late of the *Parish* of
 “ *St. Margaret Westminster* in the *County* of *Middlesex* *Labourer*,
 “ hath given Us *Security* that the *Suit* shall be *prosecuted*, by
 “ *Robert Bigby* late of the *Parish* of *St. Margaret Westminster*
 “ in the *County* of *Middlesex* *Plasterer*, and *Joseph Brown-*
 “ *ing* late of the same *Place* *Bricklayer*,” Therefore We com-
 mand You that You attach *Matthew Kennedy* late of the *Parish*
 of *St. Margaret Westminster* in the *County* of *Middlesex* *Labour-*
 er and *Patrick Kennedy* late of the same *Place* *Labourer*, by
 their *Bodies*, according to the *Law* and *Custom* of *England*,
 So that We may have them before Us on the *Morrow* of the
Ascension of the *Lord*, wherever We shall then be in *England*, to
 answer the aforesaid *Ann* of the *Death* of the aforesaid *John*
 heretofore her *Husband*, whereof She appealeth them: And have
 You then there this *Writ*.

This *Writ* was returned, as to *Matthew Kennedy*, by *John Tuke*
Esq; *Sheriff*, and *Philip Detillin* *Keeper*; and his *Person* brought
 into *Court*, as above.

The *Writ* and *Return* were ordered to be filed.

Mr. Serjeant Glynn moved that he might be committed to the
Marshal. And He was so.

Mr. Serjeant Glynn then moved, that the *Appellant*, being
 in *Court*, might *count* against this *Defendant Matthew Ken-*
nedy.

She thereupon delivered in the *Appeal* to *Mr. Benton*, *Second-*
ary on the *Civil Side*; who read it.

It was as follows—

EASTER TERM in the tenth Year of the Reign of King George
 the Third.

Middlesex— AND now, this Day, to wit On *Friday*
 to wit— A the *Morrow* of the *Ascension* of our
Lord in this same Term, before our *Lord* the *King* at *West-*
minster, comes *Matthew Kennedy* in the *Custody* of the *Sheriff* of
Kent, in *Court* here brought by virtue of the *Writ* of our *Lord*
 the *King* of *Habeas Corpus* to him the said *Sheriff* of *Kent* and

to

to the Keeper of his Majesty's Gaol at *Maidstone* in the County of *Kent* directed; and *Patrick Kennedy* in the Custody of the Sheriff of *Middlesex*, in Court here brought by virtue of the Writ of our Lord the King of *Habeas Corpus* to Him the said Sheriff of *Middlesex* and to the Keeper of his Majesty's Gaol of *Newgate* in the City of *London* directed; and are instantly committed to the Custody of the Marshal of the *Marshalsea* of our said Lord the King before the King Himself, there to remain until &c. And the aforesaid *Ann Bigby* Widow, who was the Wife of the aforesaid *John Bigby*, likewise comes here now into Court in her own proper Person, and by Bill instantly appealeth the said *Matthew Kennedy* and *Patrick Kennedy*, being in the Custody of the Marshal of the *Marshalsea* of our Lord the now King before the King Himself, of the Death of the said *John Bigby* formerly her Husband. And there are Pledges of prosecuting her said Bill, that is to say, *Robert Bigby* of the Parish of *St. Margaret Westminster* in the said County of *Middlesex* Plasterer, and *Joseph Browning* of the Parish and County aforesaid Bricklayer: Which said Bill follows in these Words, that is to say, *Middlesex* to wit,—*Ann Bigby* Widow, who was the Wife of *John Bigby* late of the Parish of *St. Margaret Westminster* in the County of *Middlesex* Labourer, in her own proper Person instantly appealeth *Matthew Kennedy* late of the Parish of *St. Margaret Westminster* in the County of *Middlesex* Labourer, and *Patrick Kennedy* late of the same Place Labourer, being in the Custody of the Marshal of the *Marshalsea* of our Lord the now King before the King Himself, of the Death of the said *John Bigby* who was her Husband; For that the said *Matthew Kennedy* and *Patrick Kennedy*, not having the Fear of God before their Eyes, but being moved and seduced by the Instigation of the Devil, on the 24th Day of *December* in the tenth Year of the Reign of our said Sovereign Lord *George the Third* King of *Great Britain* and so forth and in the Year of our Lord 1769, about the ninth Hour in the Evening of the same Day, at the Parish of *St. Margaret Westminster* aforesaid in the County of *Middlesex*, with Force and Arms &c, in and upon the said *John Bigby* in the Peace of God and of our said Lord the King then and there being, feloniously wilfully and of their Malice aforethought, did make an Assault; and the said *Matthew Kennedy*, with a certain Iron Poker of the Value of Six-pence, which he the said *Matthew Kennedy* in his right Hand then and there had and held, Him the said *John Bigby* in and upon the hinder Part of the Head of Him the said *John Bigby* then and there feloniously wilfully and of his Malice aforethought did strike; Giving to the said *John Bigby* with the said Iron Poker, by the Stroke aforesaid in Manner aforesaid, in and upon the said Hinder Part of the Head of Him the said *John Bigby*,

1

One

One Mortal Wound, of the Length of two Inches and of the Depth of half an Inch; of which Mortal Wound the said *John Bigby*, on the said 24th Day of *December* in the Year aforesaid at the Parish aforesaid in the County aforesaid did languish and languishing did live, and afterwards on the said 24th Day of *December* in the Year aforesaid, He the said *John Bigby* at the Parish aforesaid in the County aforesaid of the said Mortal Wound died; And that the said *Patrick Kennedy* feloniously wilfully and of his Malice aforethought was present aiding, helping, abetting, comforting, assisting and maintaining the said *Matthew Kennedy* the Felony and Murder aforesaid in Manner and Form aforesaid to do and commit. And so the said *Matthew Kennedy* and *Patrick Kennedy* feloniously wilfully and of their Malice aforethought did kill and murder Him the said *John Bigby*, against the Peace of our said Lord the King his Crown and Dignity &c. AND if the said *Matthew Kennedy* and *Patrick Kennedy* will deny the Felony and Murder aforesaid as aforesaid charged upon them, Then the said *Ann Bigby*, who was the Wife of the said *John Bigby*, is ready to prove the said Felony and Murder against them the said *Matthew Kennedy* and *Patrick Kennedy*, according as the Court here shall consider thereof; and hath found Pledges to prosecute her Appeal.

Witness

Ann Bigby

her

X

Thomas Stamford

Mark

Mr. *Wallace*, for the Defendant, prayed Oyer of the Original Writ, the Return, and the Declaration.

Nothing further was now done.

LORD MANSFIELD asked, if they had any Objection to his being taken away.

And it being answered—"None;"

He was taken away, by a Tipstaff.

Afterwards, on the same Day,

Patrick Kennedy, the other Appellee, was brought into Court by the Keeper of *Newgate*, by virtue of a *Habeas Corpus* to Him directed, and also to the Sheriff of *Middlesex*.

THE

THE SUBSTANCE of the Return made by the Sheriff of *Middlesex* and the Keeper of *Newgate*, to the *Habeas Corpus* directed to them, commanding them to bring up the Body of *PATRICK Kennedy*, consisted of the following Causes of Detention; *viz.* A Commitment of Him (together with one *Matthew Kennedy* and *Michael M'Mabon*) on *Suspicion* of this Murder; 2dly. A Detainer by Warrant of two Justices, upon *Oath*; 3dly. A like Detainer, by the Coroner's Warrant; 4thly. an Order made at the Delivery of the Gaol of *Newgate* at the *Old Bailey*, on 17th *January* 1770, Ordering the said *Matthew Kennedy*, *Patrick Kennedy*, *Michael M'Mabon* and *John Evans*, standing indicted for the Wilfull Murder of the said *John Bigby*, and also standing charged for the like Murder on the Coroner's Inquisition, to remain till next Session; 5thly, an Order made at the said Gaol-Delivery of *Newgate* at the *Old Bailey*, on 21st *February* 1770, " *Patrick Kennedy*, attainted of the Murder of *John Bigby*, and
 " ordered to be hanged by the Neck until he be dead, on *Monday*
 " next, and afterwards to be Dissected and Anatomized accord-
 " ing to the Form of the Statute in that Case made and provided:
 " But Mr. Justice YATES, who tried Him, for reasonable Cause
 " doth respite his Execution for the Space of One Week, ac-
 " cording to the Form of the Statute in that Case made and pro-
 " vided." 6thly. a Detainer by virtue of a Respite of Execution, under the Hand and Seal of *Ld. Weymouth*, one of his Majesty's principal Secretaries of State, dated 24th *February* 1770, signifying his Majesty's Pleasure that the Execution of the Sentence of Death passed upon the said *Patrick Kennedy* be respited for One Week from the Time appointed for his Execution. 7thly. a Detainer by virtue of another Respite of Execution under *Lord Weymouth's* Hand and Seal, dated 1st *March* 1770, signifying the King's Pleasure for a Respite of his Execution till further Signification of his Majesty's Pleasure. 8thly. a Detainer by virtue of an Order made at the Delivery of the Gaol of *Newgate* at the *Old Bailey*, on 25th *April* 1770, " *Patrick Kennedy*, at-
 " tainted last Session, of the Wilful Murder of *John Bigby*, and
 " received Judgment to be executed; and afterwards dissected and
 " anatomized pursuant to the Statute &c; And having been res-
 " pited. And at this present Session of Gaol Delivery of *Newgate*,
 " cometh *Ann Bigby* Widow, who was the Wife of the said
 " *John Bigby* deceased, in her proper Person, and bringeth here
 " into the Court here a certain BILL of Appeal against the said
 " *Patrick Kennedy*. And upon this, It is said by the Court here, to
 " the said *Patrick Kennedy*, now here being brought to the Bar and
 " charged with the Appeal aforesaid, that He immediately answer
 VOL. V. S " &c.

“ &c. And the said Appeal is now here adjourned until the next
“ Session. And that the said *Patrick Kennedy* do remain until
“ the next Session. By the Court.”

And these are the Causes &c.

R. Akerman, James Townshend, and John Sawbridge,
Sheriff.

The Return being read, and the Writ and Return being Ordered to be filed,

Mr. Serjeant *Glynn* prayed that this Defendant *Patrick Kennedy* might also be committed to the Marshal.

And he was committed accordingly.

Serjeant *Glynn* then moved, that the Appellant, being in Court, might *Count* against him. She will give her Consent to the Count, as read by the Officer.

The Serjeant observed, that they proceeded *now* by BILL against the Defendant, as in *Custody of the Marshal*: And he said, that the *former* Proceedings would *drop*, of Course. He took Notice, that the Count is *joint*, against *Matthew* and *Patrick* Both. It is in Possession of the Officer of the Court. This is the only Method, he said, of proceeding against Two who came hither from *different Custodies*.

Mr. Serjeant *Leigh*, on the same Side, (for the Appellant), said, there was no other Way but this, when the Appeal is against *two*. There can't be two Writs.

Mr. *Wallace, contra*, (for the Defendants,) observed, that THIS *Bill* was exhibited against *Matthew*, before *Patrick* was in *Custody*: Therefore it can't affect *Patrick*, though he is *now* in *Custody*. And he insisted, that if they would affect *Patrick* as being now in *Custody*, it must be by ANOTHER *Bill*. 4 Co. 47. b. Cases of Appeals and Indictments. Mr. *Wallace* did not object against the former Count's being read as against this Defendant; provided it be as a *Writ*, not as a *Bill*: He agreed to its being now read; provided that the Entry be made according to the Fact.

LORD MANSFIELD—The Entry must be made so.

LORD

Mr. *Benton* then read the Count over again.

LORD MANSFIELD—Do Either of You pray any thing else?

Answer—"No."

LORD MANSFIELD—Then the Officer must take him away.

On Monday 28th May 1770, (Mr. Justice ASTON being absent, sitting in the Court of *Chancery*,)

Mr. *Walker*, for the Appellant, moved for a *Habeas Corpus*, to bring up Both the Defendants, this Morning, in order to arraign the Appeal. He said, they could have them here before the Rising of the Court.

Granted.

The Defendants being accordingly brought into Court, before it rose,

Mr. *Walker* prayed that they might plead.

Mr. *Wallace*, *contra*, said They had no Copies of the Writ, or Return, or Declaration.

Mr. *Walker* would have had it understood, that the former Proceedings still SUBSISTED; and prayed that they might be arraigned upon the Bill.

But the Counsel for the Defendants asserted, and the Judges remembered, that Serjeant *Glynn* said*, upon the former Occasion "that the former Proceedings were at an End."

* See last Page.

Mr. *Walker* replied—We pursue the Bill of Appeal lodged at the *Old Bailey*: We now pursue the same Words. We pursue the former Bill, in this Bill; which is a Continuance of the former Bill lodged at the *Old Bailey*.

LORD MANSFIELD—Do You pray that they may be arraigned upon the Count or Bill read here in Court on Friday last?

Mr. *Walker* answered, "that he did."

LORD

LORD MANSFIELD—Take that down. They are to take the Method that they think proper.

Mr. *Benton* informed the Court, that he had not that Bill here. It is filed in the Office: And he had had no Notice to “bring it.”

Serjeant *Glynn* desired that he might send for it.

LORD MANSFIELD—You should have given Notice. The Record remains in the Office, upon the File. The Court cannot give Directions to send for it; nor are they to stay for it. You may apply to the Officer to send for it; if you think proper. If you had arraigned them on *Friday*, You might have asked for a Plea.

Mr. *Benton* sent to the Office for the Record. But it did not come in Time: And, the Court being ready to rise,

Serjeant *Glynn* moved to adjourn the Appeal. He said, the Officer ought to have had the Record in Court; as the Proceeding is *de Lie in Diem*.

Mr. *Wallace* and Mr. *Dunning* exculpated the Officer; and said that the Appellant should have given him Notice “to bring it down.” But they have not even given us *Oyer* of the Writ, Return, and Count.

THE COURT, viz. Mr. Justice WILLES and Mr. Justice BLACKSTONE, (LORD MANSFIELD being now gone, and Mr. Justice ASTON in Chancery,) thought it right to wait a reasonable Time, for the Return of the Messenger.

And, in a very short Time, he returned, with the Record.

The Record being now in Court, the Defendants were ordered down to the Bar.

Their Counsel desired to hear the Bill read again. And it was read again, by Mr. *Benton*. This was done, before they were actually taken down to the Bar.

Mr. *Wallace*, Mr. *Dunning*, and Mr. *Murphy*, objected, on behalf of the Defendants, to their being arraigned at the Bar,
upon

upon *this* Bill; which, as they alledged, contained a *false Fact*: Which false Fact, if it stood upon Record, might preclude them from shewing the *Truth* of the Fact. The false Fact alledged in the Bill was, that the Defendants were *Both* of them brought into Court at the same Instant; And that the Appellant counted against *Both* at the same Time, *Both* being then in Custody of the Marshal: Whereas the Truth of the Fact was, that *only One* of them, namely *Matthew*, was in Custody of the Marshal at *that* Time, (the Time when the Appellant counted against *Matthew*.) "*Patrick* was *not* then in Custody of the Marshal: And therefore the Bill ought not to have alledged that he was. It ought to have recited the Truth, "that *Matthew* was in his Custody; and *Patrick* not so." They prayed, therefore, that the Truth of the Fact might be recorded, before the Defendants were arraigned at the Bar; As *this* Bill contained these false Facts.

Serjeant *Glynn* denied that there was any Insufficiency upon the Face of this Bill. He insisted that they could not avail themselves of this Objection, otherwise than by *Plea*. The Bill must be either quashed, or answered: And they don't move to have it quashed. The Defendants ought therefore to be set to the Bar, and arraigned upon it.

Mr. *Dunning* answered, that they could not plead to it; because such a *Plea* would be averring against the Record.

Mr. Serjeant *Leigh*, Mr. *Walker*, and Mr. *Davenport*, for the Appellant, argued that as the Court had received the Bill, and the Defendants had not prayed to quash it, it must be answered: And if they had a Defence against it, or could take Advantage of it, it must be by *Plea*. They even asserted that the Fact alledged in the Bill is *true*. For, the whole Term is considered as *One Day*: And therefore this is an Act of One and the same Day. Neither *Matthew* could object "that *Patrick* was not in Custody;" nor *Patrick*, "that *Matthew* was not in Custody." At least, there can lie no Objection in the Mouth of *Matthew*: For, He was then in Custody. Only One Bill could be brought against Both. This is the only Method.

Mr. *Wallace* and Mr. *Dunning* urged, that the Idea of the Person who framed this Bill certainly was, that *Both* would be brought into Court, and *Both* committed to the Custody of the Marshal, at the very *same* Time. Yet, notwithstanding the fictitious Notion of the whole Term being but One Day, or a whole Day being but as One Instant, it is clearly true, in real Fact,

“ that *Patrick* was *not* in Custody, at the *Time* when this Bill says “ that he was:” Nor was he in Court, when the Bill was arraigned against him. Therefore the Court had no Authority to receive the Bill, as against *him*.

THE TWO JUDGES were of Opinion, That they could not refuse the Arraigning the Defendants at the Bar, upon this Bill; as there had been no Motion made “ to quash it.” The Appellant ought not therefore to be precluded from the Liberty of arraigning them; whatever Objections the Defendants might be intitled to take, after the Arraignment.

The Defendants were then set to the Bar.

Serjeant *Leigh* thereupon arraigned the Appeal. Which he did, by reading over only the Bill itself; passing over the Memorandum-Part, or Introduction to it.

Mr. *Benton* then read it, in the same Manner; beginning where the Serjeant begun; and only changing the third Person to the second, *viz.* altering “ He” into “ You,” and addressing himself to the Defendants. And he concluded with asking them separately “ Whether they were guilty of the Felony and Murder “ charged upon them by this Bill of Appeal, or not Guilty.”

The Counsel for the Defendants then prayed that it might proceed no further at present; As they had had no previous Notice at all of being brought up hither this Morning; nor had had any *Oyer* of the *Original Writ*, Return, and Declaration; And it was then understood to be a Count upon the *Original Writ*. Therefore it was not reasonable, they said, that the Defendants should be called upon to plead now directly. And yet they did not care to move expressly and explicitly for an *Adjournment* of the Appeal.

Serjeant *Glynn*, on the other Side, declared that he did not desire to precipitate the Matter.

THE COURT (the two Judges) on their Part, were not inclined to adjourn it, *as from themselves*, without any Motion on either Side. They were not to interfere, they said, one Way or another, without Motion from either Side.

Neither Side, however, inclined to move to adjourn it.

THE

THE COURT at Length said, that they saw no Harm in adjourning it till next Term, *if* the Appellant did not object to it.

The Counsel for the Appellant did *not* object to it.

THE COURT thereupon made a Rule to adjourn the Appeal till *Friday* next after the Morrow of the Holy *Trinity*; and remanded the Defendants; And ordered them to be brought up again upon that Day.

THE RULE was in these Words—The Defendants being this Day brought to the Bar of this Court, and arraigned; and being called upon to plead; and the same being objected to, for Want of sufficient Notice; IT IS ORDERED that the Appeal between the Parties be adjourned to *Friday* next after the Morrow of the Holy *Trinity*; And that the Defendants be remanded into the Custody of the Marshal of the Marshalsea of this Court; And that the said Marshal do bring the Defendants into this Court, upon the same Day.

By the Court.

Note—it is usual to mention, on *whose Motion* every Rule of Court is made. But here was no Mention of any Counsel (either of the One Side or the other) on whose Motion the present Rule was made.

On *Friday* 15th *June* 1770, The Defendants were accordingly brought into Court; And the Appellant was also present in Court. The Defendants were not now set to the Bar.

Serjeant *Glynn* moved, that the Defendants might plead.

The Counsel for the Defendants objected, that they had not yet had *Oyer* of the *Original Writ*, Return, and Declaration, which he prayed the first Day.* They said they had examined the Records in Court; and there was no such *Writ* here: Therefore it was out of their Power to take Copies of it. In *Child's Case*, 2 *Bulstrode* 19. the Court ordered the Sheriff to return his *Writ* presently. They ought to bring it into Court.

Serjeant *Glynn* denied that they were obliged to bring it into Court. We have nothing to do with it. We have not the legal Custody of the *Writ*: We can not give *Oyer* of it.

* V. ante, p.
2646.
† V. ante, p.
2651.

THE COURT (Lord Mansfield, Mr. Justice Willes, and Mr. Justice Blackstone,) were All of Opinion, that as it appeared upon the Return of the Sheriff of Kent and the Keeper of Maidstone Gaol to the Habeas Corpus directed to them, * that there was an Original Writ; and as Oyer of it had been prayed and † granted; they ought to have it, before any further Step can be taken to oblige them to plead: And the Appellant ought to produce the Record.

Let them be remanded.

On Tuesday 3d. July 1770.

Serjeant Glynn notified, that they intended to bring up the Defendants To-morrow; and to argue "that the Court ought not to have granted Oyer of the Writ."

It was answered, by the Court and the Counsel for the Defendants, "that this Oyer had been granted long ago (the 25th of May,) in a preceding Term:" And Mr. Justice Aston (now in Court) intimated, that if the Court had granted Oyer when they ought not to have granted it, it was Error.

THE COURT thought it would be improper and inconvenient to enter into a solemn Argument upon this Question, upon the last Day of a Term, (as To-morrow would be:) But, upon Serjeant Glynn's observing, that though it should not be solemnly argued, yet it was necessary that something should be done; and, at least, the Appeal adjourned;

A RULE was made, to bring them up To-morrow, at the Sitting of the Court.

Next day (Wednesday 4th July 1770.)

The Defendants being brought into Court, (not set at the Bar,)

Mr. Cox moved, on behalf of the Appellant, that the Appeal might be adjourned till next Term.

THE COURT granted the Motion; and ordered the Defendants to be

REMANDED.

The RULE was—The Defendants being this day brought into Court, IT IS ORDERED that the said Defendants

Defendants be again remanded into the Custody of the Marshal of the Marshalsea of this Court; And that the Appeal between the Parties be adjourned until *Tuesday* next after the Morrow of all Souls next coming.

On *Tuesday* this 6th of *November* 1770, being the first Day of the present *Michaelmas* Term,

The Defendants were brought into Court, by a *Habeas Corpus*, applied for by themselves.

Serjeant *Glynn* moved, that they might plead.

Mr. *Wallace* moved, that the Appellant might be called.

THE APPELLANT was accordingly called—"Ann Bigby, Come forth, and prosecute your Appeal against *Matthew Kennedy*; Or he will be discharged:" This was repeated three Times in each Cause. But the Appellant, though thus called upon three Times in each Cause, did *not* appear.

Mr. *Wallace* thereupon moved, that the NONSUIT might be Recorded.

LORD MANSFIELD—Let the Nonsuit be recorded.

Mr. *Wallace* then moved, that the Defendants might be remanded into the Custody of the Marshal.

LORD MANSFIELD—Let the Defendants be remanded into the Custody of the Marshal.

See upon this Subject, 2 *Hawkins's P.C.* ch. 23. pa. 155 & 161.

Tinkler versus Poole and Another.

Tuesday 11th
Nov. 1770.

THIS was an ACTION of TROVER for Goods seized by a Custom house Officer. It was a Parcel of Herrings seized by him for not having satisfied the Salt-Duty, and carried by him to the King's Warehouse. It was agreed that they were *not* seizable: And the only Question was "Whether *this* SPECIES of ACTION lay against the Officer, for seizing them and carrying them away.

VOL. V.

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Serjeant

Serjeant *Glynn*, for the Plaintiff, argued that it *did*. The *Conversion*, he said, was the substantial Part of the Action: The Trover is fictitious. The Defendant had no Authority to take them. He took them wrongfully. He was a Wrong-doer. He acquired a tortious Property of them in Himself.

Trover lies in similar Causes. It lies against a Sheriff, for the unlawful Conversion of the Goods of a Bankrupt. 1 *Burrow*, 20 to 37. *Cooper* and Another, Assignees of *William Johns* a Bankrupt, against *Chitty* and *Blackiston*, Sheriffs of London. A tortious Taking is, in itself, a Conversion.

There is indeed a single *Nisi prius* Case reported in *Bunbury* 67. Mich. 1720, At Guildhall Sittings after that Term, before Ld. Ch. Baron *Bury*; *Etrick* v. an Officer of the Revenue. Upon an Information of Seizure of Goods, there had been a Verdict for the Defendant: Who afterwards brought Trover against the Officer, for the Goods. The Attorney General objected, that Trover did not lie for these Goods, (For that the Seizure of them and putting them into the Custom-house Warehouse could not be said to be any Conversion to his own Use;) but *Trespass*, or *Trespass upon the Case*: And Mr. Attorney insisting upon a Special Verdict, and the Chief Baron inclining to be of that Opinion, "that Trover would *not* lie;" the Plaintiff chose to be Non-suited. But this is no solemn Determination.

LORD MANSFIELD said, Mr. *Bunbury* never meant that those Cases should have been published: They are very loose Notes.

Mr. Justice WILLES mentioned another Case in *Bunbury* pa. 80. Trin. 1721. *Israel* v. *Etheridge et al'*, where Baron *Price* said that it was now allowed and taken for Law "that Trover *did not lie* against an Officer, for seizing *absque probabili Causa*; "but *Trespass* would." Baron *Montague* was of Opinion, "that *neither Trover nor Trespass* would lie; because the Seizure is not *contra Pacem*: but that *Trespass upon the Case*, setting forth, "that the Seizure was *absque probabili Causa*, would lie." Baron *Page* was of Opinion, "that *Trespass*, or Case for the consequential Damages, will lie."

Mr. *Dunning*, for the Defendants, remarked upon the Case last cited, that it appeared by it, that the three Barons, *Price*, *Montague*, and *Page*, all concurred in the Opinion "that Trover *would not lie*."

Lord

LORD MANSFIELD—It is a very loose Note. It makes Baron *Montague* say “that *Trespass* would not lie.”

Mr. Justice WILLES mentioned the Case of *Kenicot v. Bogan* in *Yelverton* 198: which was Trover and Conversion of two Tons of Wine, taken for Prisage.

LORD MANSFIELD, who tried the present Cause, said He saved this Point, upon the Cases cited out of *Bunbury*, by the Counsel for the Defendants. But Nothing is clearer, than “that Trover *lies*.” It is a *wrongful Conversion*; let the Property be in whom it will.

The Case of *Chapman v. Lamb*, in 2 *Strange* 943, was mentioned by Mr. *Wallace*; which was subsequent to the Others, being in *Michaelmas* Term 6 G. 2. It was Trover against a Custom-house-Officer for 14 Shirts, a Night-Gown, and Cap, seized for Non-Payment of Duty; which were stated, negatively, “not to be imported as Merchandize.” The Plaintiff had Judgment; without any Objection to its being an Action of Trover.

THE COURT ordered the POSTEA be delivered to the PLAINTIFF.

Note—As to the two Cases in *Bunbury*, viz. *Etriche v.* an Officer of the Revenue, *pa.* 67. and *Irael v. Etheridge et al.* *pa.* 82. in the third Term after the former; I very strongly suspect them to be a Continuation of the same Case. The Owner of the Goods, finding that his Action of Trover met with so much Opposition, chose to give it up; and seems to have immediately brought his Action of *Trespass* against the Officers: Which is the Subject of the latter Case. The Names “*Etriche*” and “*Etheridge*” sound very nearly alike, to the *Ear*; though they have less Resemblance, to the *Eye*, when written. The only Difficulty is, that in the former Case, *Etriche* seems to be the Owner of the Goods; in the latter, *Etheridge* and others seem to be the Officers of the Revenue. But this Difficulty vanishes, upon the Supposition that Mr. *Bunbury*’s were loose and inaccurate Notes, not intended for more than to refresh his own Memory: For, no Sort of Inaccuracy is more frequent amongst Note-Takers, than an Inattention to the precise Names of the Cases, and the Transposing the Names of the Plaintiffs and Defendants.

Now,

Now, supposing such a Transposition to have happened, in taking *either* of these two Notes; The whole Difficulty is at an End, and the apparent Difference reconciled.

Thursday
15th Novem-
ber 1770.

Hopwood *versus* Adams.

A JUDGMENT was entered up by an Attorney's Clerk; who used the Name of Mr. Cobb, a regular Attorney; but without Mr. Cobb's Knowledge or Consent.

Mr. Wallace had therefore moved, on Behalf of the Defendant, to set this Judgment aside, as an irregular One.

Mr. Dunning, on Behalf of the Plaintiff, insisted very strenuously upon its being a *regular* One. The Attorney's Clerk, who entered it up, was employed by the Plaintiff, and used the Name of a regular Attorney. Whatever Penalty he may have incurred, or however he may be answerable for his Conduct, Yet the Judgment is regular. But

LORD MANSFIELD, Mr. Justice WILLES, and Mr. Justice ASHHURST, (Mr. Justice ASTON being absent, in Chancery,) were unanimous that it was irregular, and ought to be set aside.

JUDGMENT set aside.

Monday 19th
November,
1770.

Bush *versus* Bates.

MR. Dunning shewed Cause, on Behalf of the Plaintiff, why *Common Bail* should not be accepted.

The Action was brought upon a Judgment of Nonsuit, merely *for Costs*.

Mr. Dunning endeavoured to distinguish this Case, from that of an Action brought upon a Judgment, where the *Original Debt* was *under* ten Pounds, but the Judgment is, by *Addition of the Costs*, raised to *upwards* of ten Pounds; (in which Case, the Defendant is * *not* holden to *Special Bail*.)

* V. ante,
Vol. 4th. pa.
2117 2118.
B. lither v.
Gibbs.

2

But

But LORD MANSFIELD and Mr. Justice ASTON were so far from allowing such a Distinction, that they thought it rather *less* reasonable to hold to Special Bail, in the present Case than in the Case alluded to.

Mr. *Lucas* was for the Defendant.

THE RULE was made absolute, for accepting *Common* Bail.

Rex *versus* Woodfall.

Tuesday 20th
November
1770.

THIS Cause first came before the Court, on Friday 22d June 1770.

Mr. *Lee* then moved, on Behalf of the Defendant, to *stay* the entering up Judgment against him, upon the Verdict found in this Cause.

A Cross-Motion was made at the same Time, by the Counsel for the Crown, for the Defendant to shew Cause why the Verdict should not be entered according to the *legal Import of the Finding* of the Jury.

It was an Information against the Defendant, by the Attorney General, for Printing and Publishing in the Public Advertizer, a Seditious Libel Signed *Junius*. Upon the Trial, the Jury found him guilty of the *Printing and Publishing*, ONLY.

THE COURT granted Rules to shew Cause, upon each of these two adverse Motions; and ordered them Both to be brought on upon the same Day.

Accordingly, on Tuesday 3d July 1770, Cause was reciprocally shewn, on each.

Serjeant *Glynn* and Mr. *Lee* argued for the Defendant: Mr. *Thurlow*, (Solicitor General,) Mr. *Morton*, Mr. *Wallace*, Mr. *Dunning*, and Mr. *Walker*, for the Crown.

On the Part of the Defendant, it was insisted that the Verdict, *as found*, did not amount to find Mr. *Woodfall* guilty of the Charge in the Information; but rather to acquit him of it. For, he is charged with Printing and Publishing this as a Libel, with a *malicious and criminal Intention*: But the Jury find him guilty

of printing and publishing, *only*. Whatever the Jury do not find implies a Negative: But this goes further; it says expressly, that they find this, and this *only*.

A *Criminal Motive* goes to the Construction of the Offence: A *Criminal Intention* is its *Essence*. And this the Jury have negatived.

They are *Judges of Law and Fact*, as far as Law is involved in Fact. They *may* take this upon them: And here they *have* done so. They meant to acquit him of all Criminal Intention: And One of the Jurymen has made an Affidavit "that he meant to acquit him of all criminal Construction: And if he had thought that that could not have been thus done, he would have acquitted him." Therefore this can't be considered as a Verdict of Conviction by twelve Jurymen. A Verdict ought to be found clearly, fully, and distinctly: It can't be supplied by Inference; neither can it be amended by any Notes of the Associate, in a Criminal Case. 1 Salk. 53. *Rex v. Bold*. 1 Salk. 47. *Rex v. Keate*.

They also cited *Cro. Jac.* 210. *Cook v. Laneday*; and *Yelverton* 106; and *Drury v. Dennis*; 2 *Rolle's Abridgment* 693. Title, "Verdict," Letter S. pl. 5. between *Baugh* and *Philips*, referred to by *Ld. Ch. J. Vaughan* in the Case of *Rowe v. Huntington*, *Vaughan* 75, 76. Who there says "that Finding the Point in Issue, by way of Argument, in a general Verdict, is never permitted; not though the Argument be necessary and conclusive." There can be no Supply by Intendment, in any Case; much less in the present, where it is impossible to supply the Verdict by Intendment, because no Body can know what the Jury did intend, or by what Rule, or upon what Principle they decided; unless Affidavits from the Jurymen were allowed to be read. Another Authority that they cited, was the Case of *Shelley v. Alsop*, in *Yelverton* 77, 78. which was a Finding of the Assumpsit by foreign Implication; "which is not good, (as it is there said,) upon any general Issue:" And it is there laid down, "that the Jury ought to give their Verdict precisely according to their Charge."

They insisted, that the Verdict ought to remain in the *Words* of the Jury; without expunging any of their Words, or substituting Others in their Places, or controlling them under any Pretence of legal Construction. They ought to be left as they stand; that the Defendant may have the Benefit of a Writ of Error to the House of Lords, if the Opinion of this Court should be against him.

They

They hoped, however, that the present Finding would be esteemed by the Court to amount to an *Acquittal* of the Defendant.

But, if the Court should not go so far as to hold it tantamount to an Acquittal, there ought, at least to be a *Venire facias de novo*. It certainly is not a Conviction: And if it be not an Acquittal, it can be no more than an imperfect Verdict. And if a Verdict be *imperfect*, there must be a *Venire facias de novo*. But We hope for his Discharge, as upon a Verdict of Not Guilty.

On the Part of the Prosecution, it was argued that the present Verdict could not be considered as a Verdict of not guilty. It positively and explicitly finds him *Guilty* of the *Printing and Publishing*: And it don't import any Negation of his Guilt, as to the Rest. The Word "*only*" does not import the Exclusion of any thing but *Facts*: It can't exclude *Conclusion of Law*.

It is certain that a Verdict can't be amended in Matters of *Fact*: But it may be perfected in Point of *Form*. The Officer takes his Note short: But the necessary Finishing of the Sentence may be supplied. The Substance and Matter of this Issue is sufficiently found: The Court may order it into a proper Form. The *Law* here implies the Intention. The Printing and Publishing was all that the Jury were to inquire about. This Verdict is not Imperfect; nor is there any Need of supplying any thing by *Intendment*. The Intention must be collected from the Libel itself. The Intention is the Gift of the Offence. The Verdict ought to be entered according to the true Meaning and Intention of the Jury. *Something* is always to be added to *every* Verdict: The Entry is never in the very identical Words used by the Jury; which are always concise, and not full and formal enough to stand supported against a Writ of Error.

Whether a Jury *may* or may not take upon themselves to judge of Matters of Law, they must at least do it at their Peril. But here they have not done it at all: They have not determined, that this Paper is not libellous. So that Whether they may at their Peril do it, or Whether they may not, they have not here risked that Peril. The Import of their Verdict is a general Finding of the *Facts*, without expressing any Sense of their own upon the *Law*.

In the Case of the King against *Beere*, reported in 12 *Mod.* 218. 2 *Salk.* 217. 1 *Lord Raym.* 414. *Carthew* 407. and *Holt* 422. the Jury, as to the *Writing* and *Collecting* of the Libels only, find him guilty, *prout* in *Indictamento supponitur*: And as to all other things charged in the Indictment, *præter Scriptionem et Collectionem*, they find him not guilty. The Charge was for composing, making, writing, and collecting several scandalous false and seditious Libels. The Finding was—"quoad Scriptionem et Collectionem Libellorum in Indictamento mentionat' tantum, quod defendens est culpabilis; et quoad totum residuum in eodem Indictamento content', quod defendens non est inde culpabilis." It was holden "that the bare Writing and Collecting the libellous Matter was criminal;" and "that the general Finding shall be taken to be criminal." And *Turton* and *Rokeby* cited some Cases to prove, "that the Writing of a Libel, without Publishing it, was punishable by Indictment."

They also cited *Moore* 194. *Dyer* 362. *Hobart.* 54. *Moore* 388. 2 *Lev.* 111. and, to prove that the Word "only" might be rejected, 2 *Saunders* 380. *Co. Lit.* 227.

Serjeant *Glynn* replied; enforcing the former Argument, and denying that the Case of *Beere*, or other Cases now cited, were like the present Case.

LORD MANSFIELD—It is much too late in this Term, for any thing to be further done in this Cause, with any Effect. Let it stand over to next Term.

CUR ADVIS'

On this Day (*Tuesday* 20th *November* 1770,)

HIS LORDSHIP delivered the Opinion of the Court,

This comes before the Court upon two Rules: The first (obtained by the Defendant) "to stay the entering up Judgment on the Verdict in this Cause;" The second (obtained by the Attorney General,) "that the Verdict may be entered according to the legal Import of the Finding of the Jury."

The last Rule must, from the Nature of it, be first discussed; Because the Ground of Argument upon the other cannot be settled, till this is disposed of.

Upon

Upon *this* Rule, it is necessary to *report* the Trial.

The Prosecution is an Information against the Defendant, for *Printing and Publishing* a Libel, in the Public Advertiser, signed "JUNIUS:" The Tenor of which is set out, with proper AVERMENTS as to the *Meaning* of the Libel, the *Subject Matter*, and the *Persons*, concerning which and of whom it speaks; with INNUENDOS filling up all the Blanks, and the USUAL EPITHETS.

In Support of the Prosecution, They proved, by *Nathaniel Crowder*, "that He bought the Paper produced and twelve
" more, from *Colfield* the Defendant's Publisher, in the De-
" fendant's Publishing-Room at the Corner of *Ivy-Lane*; That
" he goes often there; has occasionally seen the Printing-
" Room; and has had Papers in the Printing-Room."

They read the Paper produced: And the Tenor agreed with the Information.

George Harris, Register of Pamphlets and News-papers, proved "that the Defendant, by Himself and Servants, paid the
" Duty for Advertisements in the Public Advertiser. That
" the Defendant had paid, himself; and all the Payments were
" in his Account. That the Defendant has made the usual Af-
" fidavit; and has been allowed the Stamp-Duty for such Pa-
" pers as were unfold. That the Duties for Advertisements
" in the Paper in Question were paid by the Defendant's Ser-
" vant; and the Receipt given on the Defendant's Account."

William Lee, Clerk to Sir *John Fielding*, proved "that He
" often carried Advertisements for the Public Advertiser, to
" the Defendant's at the Corner of *Ivy-Lane*. That he gene-
" rally paid ready Money. That he has seen Money paid to
" the Defendant for Advertisements; and he had a Receipt
" from the Defendant, signed by Him, the 29th of *November*,
" for 32*l.* for printing Advertisements in the Public Adver-
" tiser."

On the Part of the Defendant, They called No Witnesses.

His Counsel objected to *some* of the INNUENDOS: But they principally applied to the Jury, to acquit the Defendant, from the Paper being INNOCENT, or not liable to the EPITHETS given it by the Information; or, that the Defendant's INTENT in publishing did not deserve the Epithets in the Information.

VOL. V.

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There was no Doubt but that the Evidence, *if credited*, amounted to *Proof of Printing and Publishing by the Defendant*.

There *may* be Cases where the Fact proved as a Publication may be *justified* or *excused* as lawful or innocent. For, no Fact which is *not Criminal* in case the Paper be a Libel, can amount to a Publication of which a Defendant ought to be found *Guilty*.

But *no* Question of *that* Kind arose in *this* Cause.

Therefore I directed the Jury to consider “Whether *All the Innuendos and all the Applications* to Matter and Persons made *by the Information*, were, in *their* Judgment, the TRUE MEANING of the Paper.” If they thought *otherwise*, they should *acquit* the Defendant: But if they *agreed with the Information*, and *believed* the Evidence as to the *Publication*, they should find Him *Guilty*.

If the Jury were *obliged* to find whether the Paper was a *Libel*, or Whether it was a Libel to *such a Degree* as to deserve the Epithets given it by the Information; or to *require Proof of the express Intent* of the Defendant in Printing and Publishing, and of its being *malicious to such a Degree* as to deserve the Epithets given it by the Information, *Then* this Direction was *wrong*.

In Support of it, I told them, (as I have, from indispensable Duty, been obliged to tell *every* Jury upon every Trial of this Kind,) to the following Effect.

That “Whether the Paper, Meaning as alledged “by the Information, was *in Law* a LIBEL,” was a *Question of Law*, upon the *Face of the Record*: For, after Conviction, a Defendant may move in Arrest of Judgment, if the Paper is *not* a Libel.

That all the *Epithets in the Information* were *formal Inferences of Law*, from the *Printing and Publishing*.

That *no Proof of express Malice* ever was required; and, in most Cases, is impossible to be given.

That the Verdict finds only what the *Law infers* from the Fact. Therefore, *after* Conviction, a Defendant may, by Affidavit, lessen the *Degree* of his Guilt.

That where an Act *in itself indifferent*, if done with a particular Intent *becomes Criminal*; *there the Intent must be proved and found*: But where the Act is *in itself unlawfull*, (as in this Case,) the Proof of Justification or Excuse lies on the *Defendant*; and in Failure thereof, the *Law implies a Criminal Intent*.

THE JURY staid out a great While, many Hours. At last, they came to my House; (the Objection "of its being *out of the County*" being cured by *Consent*.) In answer to the usual Question put by the Officer, the Foreman gave their Verdict in these Words—"Guilty of the *Printing and Publishing*, ONLY." Nothing more passed.

The Officer has entered up the Verdict *literally*; without so much as adding the usual Words of Reference, to connect the Verdict with the Matter to which it related.

Upon this, the *two* Rules I have stated were moved for.

Upon that obtained by the *Attorney General*, the *Affidavit of a Juror* was offered by the Counsel for the Defendant.

But We are All of Opinion, "that it can *not* be received."

Where there is a Doubt, upon the Judge's Report, as to what passed at the Time of bringing in the Verdict; *there the Affidavits of Jurors or By-Standers may be received*, upon a Motion "for a New Trial" or "to rectify a Mistake in the Minutes:" But an *Affidavit of a Juror* never can be read, as to what He then *thought or intended*.

This Motion consists of two Parts: First, to fill up the *formal Words of Reference*; the second, to omit the Word *only*."

We are All of Opinion, "that the *first* is a *technical Omission* of the Clerk; and *ought to be set right*:" As to the *second*, "that the Word ONLY *must stand* in the Verdict."

There is *no Ground* from any thing which passed, to explain the Sense of the Jury so as that the Officer might have entered a *general Verdict*.

No Argument can be urged for *omitting* the Word "*only*," which does not prove "that it can have *no Effect though inserted*."
And

And therefore it is a Question of Law, upon the Face of the Verdict.

THE DEFENDANT'S Motion must be considered upon the Ground of the Word "*only*" STANDING. Was it *omitted*, there could be *no* Doubt.

"Guilty of Printing and Publishing," where there is *no other* Charge, is "GUILTY:" For, *Nothing more* is to be found by the JURY.

In the Case of the King and *Williams*, the Jury found the Defendant "guilty of Printing and Publishing the North-Briton, "N^o. 45." The Clerk entered it up, "Guilty:" And no Objection was ever made.

Where there are *more* Charges than One, "Guilty of some, "*only*," is an *Acquittal* as to the *Rest*.

But in *this* Information, there is *no* Charge *except* for Printing and Publishing.

Clearly, there can be *no* Judgment of ACQUITTAL; Because the Fact found by the Jury is the *very Crime* they were to try.

The *only* Question is "Whether, by any Possibility, the Word "*only*" can have a Meaning which would *affect* or *contradict* "the Verdict."

"That the *Law*, as to the Subject-Matter of the Verdict, is "as I have stated," has been so often unanimously *agreed by the whole Court*, upon every Report I have made of a Trial for a Libel, that it would be improper to make it a Question *now*, in this Place.

Among Those that concurred, the Bar will recollect the *Dead*, and the *Living not now here*.

And We All *again* declare our Opinion "that the Direction is "*right and according to Law*."

This Direction, though often given with an express Request from Me "that if there was the least Doubt, they would move "the Court," has never been complained of in Court. And yet, if it had been wrong, a New Trial would be of Course. It is not *now* complained of.

Taking

Taking then the Law to be according to this Direction, the Question is "Whether any Meaning can be put upon the Word "*only*," as it stands upon the Record, which will *affect* the "Verdict."

If they meant to say "they did not find it a *Libel*," or "did not find the *Epithets*," or "did not find any *express* Malicious Intent;" It would *not* affect the Verdict; Because *none of these* things were to be proved, or found, *either* Way."

If, by "*only*," they meant to say "that they did *not* find the MEANING put upon the Paper by the Information;" they *should* have ACQUITTED Him.

If they had *expressed* this to be their Meaning, the Verdict would have been *inconsistent* and *repugnant*; For, they ought *not* to find the Defendant guilty, *unless* they find the Meaning put upon the Paper by the Information: And Judgment of *Acquittal* ought to have been entered up.

If they had *expressed* their Meaning, in any of the *other* Ways, the Verdict would *not* have been affected; And Judgment ought to be entered upon it.

It is impossible to say, with Certainty, "*What* the Jury really "*did* mean." Probably, they had *different* Meanings.

If they could possibly mean *that* which, *if expressed*, would *acquit* the Defendant, He ought not to be concluded by this Verdict.

It is possible, *Some* of them might mean, not to find the *whole* Sense and Explanation put upon the Paper by the Innuendos in the Information.

If a Doubt arises from an ambiguous and unusual Word in the Verdict, the Court ought to lean in favour of a *Venire de Novo*.

We are under the *less* Difficulty; because, in Favour of a *Defendant*, though the Verdict be *full*, the Court may grant a New Trial.

And We are All of Opinion, upon the Whole of the Case, "That there should be a VENIRE DE NOVO."

Mr. Attorney General said, The *Original* Paper was lost; or, at least, was never returned back.

LORD MANSFIELD. Nothing of that Sort will vary the Justice of the Judgment.

Tuesday 20th
November,
1770.

Blesard against Hirst and Another.

THIS was an Action brought against the Defendants who are Partners in Trade, as Indorsers of a Bill of Exchange. The Defendants pleaded the General Issue. And on the Trial it appeared in Evidence, that *William Topham* of *Leeds* in the County of *York*, on the 8th Day of *March* 1769, drew a Bill of Exchange on Messrs. *Klotz* in *London*, bearing Date the same Day, for 30 *l.* payable six Weeks after Date to the Defendants or Order, for Value Received; who indorsed it to the Plaintiff. On the 18th *March*, the Plaintiff who resides at *Bradford* in *Yorkshire*, sent the Bill to *Lewis* and *Martin* his Correspondents in *London*; who received it on the 21st *March*, and on that Day or the next Day after presented it to Messrs. *Klotz* on whom it was drawn, for Acceptance; who then refused to accept it. On the 22d of *April*, which was the Day on which the Bill became due, it was presented by *Lewis* and *Martin*, and protested for Non-payment. That *Topham*, the Drawer, continued in Credit till the 11th of *April*: Soon after which, a Commission of Bankrupt Issued against him—That no Notice was given of the Refusal to Accept the Bill: But on the 29th of *April*, the Plaintiff gave Notice to the Defendants that Messrs. *Klotz* had refused to pay the Bill; and that it was returned, with Charges of Protest. On the 2d of *May*, one of the Defendants called at the Plaintiff's, in his Way from his own house to *Leeds*; and told the Plaintiff he would take up the Bill as he came back: but on his Return, he said he had been advised that he was not bound to do it. Plaintiff had a Verdict for 30 *l.* Subject to the Opinion of the Court of King's Bench upon the Question "Whether under the Circumstances of this Case the Plaintiff is Intitled to Recover."

Ja. Wallace for Plaintiff.

John Lee for Defendants.

The Fact therefore was that an Inland Bill of Exchange was drawn by *Topham* upon Messrs *Klotz*; and was indorsed by the Defendants to the Plaintiff; who presented it for Acceptance.

It

It was *refused to be accepted*. The Plaintiff kept it in his Hands three Weeks, *without giving Notice* to the Person from whom he received it, "that it had been refused to be accepted." *Topham* remained in good Credit during these three Weeks; and then failed, before the Time of Payment came.

The Question was "Whether the Plaintiff, the Holder of the Bill, could recover of the Person from whom he received it; when he had thus *neglected to give him Notice of the Refusal to accept it*."

Mr. *Davenport* argued it for the Plaintiff: Mr. *Lee* for the Defendants.

Mr. *Davenport* said that no such Notice was necessary to be given. He owned that it might have been more candid, to have given it: but he denied that the Law *required* it. At Common Law, there was no Need to present an Inland Bill of Exchange for Acceptance. The 3 & 4 *Ann. c. 9.* extends the Protesting of Inland Bills of Exchange given by 9 & 10 *W. 3. c. 17.* for Non-Payment, to the Case of Non-Acceptance: But neither of these Acts take away the Remedy upon the Bill itself, which the Payee before had.

Mr. *Lee* said, The Question was not "Whether the Holder of the Bill was *obliged* to present it for Acceptance. Here, he *did* present it; and it was refused: and the *Indorser* of the Bill ought to have been apprized of it. If any Damage happens for Want of Notice, the Person who neglects to give the Notice ought to be the Sufferer. It is a Fraud, to conceal it. Other Persons may be greatly injured by such Concealment. *Topham* remained three Weeks in good Credit: So that the *Indorser* might have saved himself, if he had had Notice of the Refusal to accept. He cited *Molloy, Lib. 2. c. 10. § 15.* and *Mareish's Advice concerning Bills of Exchange, 1670, pa. 50.* (in the small Edition;) and the Case of *Heylin and Others v. Adamson*, in my second Volume, pa. 669.

Mr. *Davenport*, in his Reply, cited 1 *Ld. Raym. 743.* and 3 *Bacon's Abridgment 612.* Title "Merchant and Merchandize," Letter L. No. 7. of the Protest—"A Protest does not raise any Debt &c."

LORD MANSFIELD observed, that this is a Matter of great Consequence to Trade and Commerce; especially, in this Country, and at this Time. This is an Inland Bill made payable

to One Man, and indorsed by him to a third Man. This third Man tenders it for Acceptance: And it is refused. He keeps it three Weeks, without giving any Notice of such Refusal to accept. He ought to have given Notice of this Refusal, and not to have concealed it; and, by not given Notice, has taken the Risque upon *Himself*. The *Indorser* of the Bill is imposed upon. The Person who neglected to give the Notice ought to suffer for it.

The Question is not "Whether he was *obliged* to present it for Acceptance." He *has* done so: And it was refused.

There is no Difference between an Inland Bill and a Foreign One, in this Case. They are Both, now, upon the same Foot: *Heylyn* and Others v. *Adamson*, in this Court.*

* V. Ante,
vol. 2.
pa. 675.

Mr. Justice WILLES and Mr. Justice ASHHURST concurred in Opinion with his Lordship. They held, that the Holder of the Bill ought to suffer for having neglected to give Notice to the Person from whom he received it, of the Drawee's Refusal to accept it. And Mr. Justice ASHHURST added, that it was understood (upon Inquiry) to be the Practice of Merchants, as well as agreeable to the Reason of the Thing, that Notice should be given.

M. Justice ASTON was gone into Chancery.

ORDERED that the POSTEA be delivered to the DEFENDANTS.

Connor v. West.

Friday 23d
Nov. 1770.

THIS was a Writ of Error from Ireland, brought by the Defendant in Ejectment, against whom the Judgment of the King's Bench there was given.

The Description the Premises demanded was "50 Acres of Furze and Heath," and "50 Acres of Moore and Marsh."

The Objection was, the not specifying or ascertaining the *Quantity* of each Species.

Mr. *Walker* argued for the Plaintiff in Error; and cited, as in Point, *Cro. Car.* 573, *Martyn v. Nichols*; which was Error of a Judgment in an *Ejectione Firme*. The Error assigned was, Be-
cause

cause the Declaration was of a Messuage, and Forty Acres of *Land Meadow* and *Pasture* thereto appertaining; and that it was *not distinguished*, how much there was in Land, how much in Meadow, and how much in Pasture: Therefore the Judgment was reversed. He also cited 1 *Salk.* 254. *Knight v. Syme*; where the Judgment was arrested, because Ejectment lies not of twenty Acres *Arable and Pasture*, without shewing *how much* of the One and how much of the Other.

Mr. *Davenport*, *contra*, for the Defendant in Error, cited *Cottingham v. King*, reported at large in my first Volume, pa. 623 to 631.

LORD MANSFIELD—It has been determined over and over, that such exact and precise Certainty is not requisite in *Ejectments*, as in a *Præcipe*.^{*} A *Præcipe* in a Real Action requires Exactness and Precision: But an Ejectment is a fictitious Action, contrived for Ease, Dispatch, and saving Expence; ‡ and has of later Times, been taken with more Latitude than formerly. And though it has been often said, “that the Descriptions ought to be so certain that the Sheriff may be able to know, without any Information from the Plaintiff, what he is to give Possession of;” Yet, in Truth and Fact, the Sheriff delivers Possession at the † shewing of the Plaintiff, and at the Peril of the Plaintiff; who is, at his Peril, to take Possession of no more than he is intitled to. I remember an Issue directed, to try whether the Sheriff had delivered Possession properly, according to the Recovery.

^{*} V. ante, 144. accord.
Alfo ante, 629 to 631.
† V. ante 668, & 1295. accord.

‡ V. ante 627 to 631. accord.

THE COURT affirmed the Judgment. (Mr. Justice ASTON was absent, in Chancery.)

JUDGMENT AFFIRMED.

Stonelake, who &c, *against* Babb.

THIS was a Question upon the Stamp-Act of 1 *Ann. Stat.* 2. c. 22. § 2. which enacts “that if any Person shall write or cause to be written Part of any Writ, Mandate, Bond, Affidavit, or other Writing in respect whereof any Duty is payable, on any Piece of Vellum &c, whereon there shall have been *before written* any other Writ &c, in respect whereof any Duty is payable, before such Vellum &c, shall be again stamped; or shall fraudulently *erase* the Name of any Person, or any Sum, Date, or other Thing, or cut off

VOL. V.

A a

“ any,

“ any Stamp from any Piece of Vellum &c, with Intent to use
 “ such Stamp for any other Writing in respect whereof any Duty
 “ shall be payable; Every Person so offending shall forfeit 20/
 “ with Costs.”

The following Case was stated and reserved at the Assizes, and afterwards argued by the two Serjeants who signed it.

Devon. ss. AT the Assizes held at the Castle of *Exeter* in and for the said County on *Thursday* the Ninth day of *August* in the Year of our Lord 1770, Before the Honourable *Edward Willes* Esq; one of the Justices of his Majesty's Court of *King's Bench* And the Honourable Sir *William Henry Ashurst* Knight one other of the Justices of his Majesty's said Court of *King's Bench*, Justices Assigned &c.

In the King's
Bench.

Between

JOHN STONELAKE who sues as }
 well for our Lord the King as } Plt.
 for himself,

and

ABRAHAM BABB

Deft.

This is an Action brought for the Penalty Specified in the Second Section of the Statute of the 1st *Ann. Stat. 2. cap. 22d.* wherein the Plaintiff in his first Count declared that the said Defendant, not regarding the Statute in such Cases lately made and provided nor fearing the Penalty therein contained, after the five and twentieth Day of *March* in the Year of our Lord 1703, to wit on the first Day of *December* in the Year of our Lord 1769, at *Tetnes* in the said County of *Devon*, wrote and caused to be written upon a Piece of Paper, Part of a Writing to wit (*James Stonelake*) and also upon the same Piece of Paper other Part of a Writing to wit (*John Cross, John Mare*;) the same Writing purporting to be that the said Defendant thereby made, ordained, constituted and appointed, the said *James Stonelake* in the same Writing mentioned his true and lawful Attorney for him and in his Name and for his Use to ask, demand, and receive Money of and from one *Samuel Jutsham* then late of *Dartmouth* in the said County but then residing in *Newfoundland* in *America*, and of and from all and every other Person and Persons whomsoever resident or being in *Newfoundland* that stood Debtor or Debtors to him the said Defendants, by Bond, Bill, Mortgage, Specialty, Note of Hand, Simple Contract, or otherwise howsoever; in respect of which said Writing so partly written and caused to be written by the said Defendant as aforesaid, several Duties were then and there payable to our said Lord the now King by Force of the Statutes

tutes in such Cases made and provided, and on which said Paper there had been before then written other Matter, to wit, Another Letter of Attorney from the said Defendant to other Persons, in respect of which said other Letter of Attorney, several other Duties were payable and paid by Virtue of the several Statutes in such Cases made and provided; which said Parts of the said Writing so written and caused to be written by the said Defendant as aforesaid were so written before the said Piece of Paper was again marked or stamped according to the Statutes in such Cases made and provided; contrary to the Form of the Statutes in that Case made and provided: By Reason whereof, and by Force of the Statute in such Case made and provided, an Action accrued to the said Plaintiff who sues as aforesaid to demand and have of the said Defendant for himself the said Plaintiff and our said Lord the King the Sum of Twenty Pounds, Parcel of the Sum of Sixty Pounds in the Plaintiff's Declaration demanded.

The Defendant pleaded *Nil debet*: And on Trial at the last Assizes for *Devon*, a Verdict was found for the Plaintiff on the said first Count in the Declaration; Subject to the Opinion of this Honourable Court on the following Case.

That in the Year 1760, the Defendant then in *England*, to wit at *Newton* in *Devonshire*, made and executed a Letter of Attorney written on Paper properly stamped thereby constituting and appointing two Persons therein named his lawful Attorneys for the same Purposes as the Letter of Attorney herein after set forth, which said first Letter of Attorney was dated the 27th *April* 1760, (and the Execution thereof Attested by two Persons who wrote their Names as Witnesses thereunto,) And nothing having been received or done under the Letter of Attorney (Except that one of the Persons therein authorized carried it to *Newfoundland* and often applied to said *Jutsham* for the Debt, tho' without Effect;) that on the 20th *April* 1769, the Defendant then in *England*, to wit at *Torquay* in *Devonshire*, erased the Names of the former Attorneys, the Date, and the Names of the Witnesses in and upon the said Paper Writing; and before the said Paper was again marked or stamped according to the Statutes in such Cases made and provided in regard to Paper upon which shall be engrossed or written in *England* any Deed or Letter of Attorney, again Sealed and Delivered the said Paper Writing, thereby purporting that he constituted and appointed one *James Stonelake* (who was then likewise in *England*) his Lawful Attorney for the Purposes therein mentioned; which Re-execution thereof was attested by two other Persons (*viz.*) *John Cross* and *John Mare*, and the Name and Addition of *James Stonelake*, and the

3

Name

Name of *John Cross* and *John Mare* were then written upon the Erasures, in the Place of the former Attornies and Witnesses; and the Date altered, from the 27th April 1760 to the 20th April 1769; which said Letter of Attorney, so altered, follows in these Words (*viz.*) KNOW ALL MEN by these Presents that I *Abraham Babb* of *Newton Abbott*, in the County of *Devon* Merchant Have made, ordained, constituted and appointed, And by these Presents do make, ordain, constitute and appoint *James Stonelake* of *Cockington* in the County aforesaid Mariner my true and lawful Attorney for Me and in my Name and for my Use to ask demand and receive of and from Mr. *Samuel Jutsham* late of *Dartmouth* in the County aforesaid but now residing in *Newfoundland* in *America*, and of and from all and every other Person and Persons whomsoever resident or being in *Newfoundland* that stand Debtor or Debtors to Me, By Bond, Bill, Mortgage, Specialty, Note of Hand, Simple Contract or otherwise howsoever; And upon Non-payment thereof, the said *Samuel Jutsham* and such other Person and Persons so being indebted to Me his and their Executors and Administrators, for Me and in my Name to sue, prosecute implead or proceed against for the same, in such manner as the Law in *America* will justify; and to do all and every other Matters and Things whatsoever as can or may be lawfully done for the Recovery of my said Debts, or settling any other Matter, Cause, or Thing whatsoever in *Newfoundland*; and upon Payment thereof or of any Part thereof, for Me and in my Name and for my Use to give proper Discharges therefore; giving and hereby granting to my said Attorney and respectively my full and absolute Power and Authority in the Premises, as effectually as if I was personally present. In Witness whereof I have hereunto set my Hand and Seal; dated this Twentieth Day of April 1769. *Abraham Babb*.

Sealed and Delivered in the Presence of Us *John Cross*, *John Mare*.

The present Case involves two Questions.

First—If any Stamp Duty was at the Time in Question, *viz.* the 20th April 1769, Payable, in respect of any Letter of Attorney made in *England*, to empower the Attorney thereby intended to be appointed to act for any of the Purposes mentioned in the said Letter of Attorney above set forth.

Secondly—Whether by any Erasure or Alteration made in the Letter of Attorney in Question by the Defendant, he is subject to the Penalty specified in the 2d Section of the Statute of the first of Queen

Queen Ann, viz. Stat. 2d. Chap. 22d. Intituled "An Act for
" preventing Frauds in her Majesty's Duty upon stamped Vel-
" lum, Parchment and Paper."

J. Burland for Plaintiff.
J. Glynn for Defendant.

THE COURT (LORD MANSFIELD, Mr. Justice WILLES, and Mr. Justice ASHHURST) were clear that the Duty was payable; the Deed being made in *England*: And they were as clear, that the Defendant was subject to the Penalty, upon the second Question. However, they thought the Plaintiff had done right, in taking only One Penalty.

They unanimously Ordered the POSTEA to be delivered to the Plaintiff.

Rex v. Bartholomew Winship and William Grunwell. Saturday 24th
November
1770.

THIS was an Indictment against the Defendants, for *not obeying an Order* made at the General Quarter-Sessions of the Peace holden at *Morpeth* in and for the County of *Northumberland*.

The Indictment states, That at the General Quarter-Sessions of the Peace of the Lord the King, holden for the County of *Northumberland*, at *Morpeth* in the County aforesaid, on *Wednesday* the 11th Day of *January* in the ninth Year of the Reign of our Sovereign Lord George the Third, King of Great Britain &c, before *Gaven Ayrley*, *Gabriel Selby*, and *William Ward* Esqrs. and Others their Fellow Justices of our said Lord the King, assigned to keep the Peace in the County aforesaid, and also to hear and determine divers Felonies, Trespasses, and other Misdemeanours, committed within the said County, It was ORDERED by the same Justices and Court there, as follows, to wit, "*Margaret Richlieu* having an Allowance of two Shillings a Week, payable to Her out of the Township of *Corbridge*, of which, the Sum of 6 l. 4 s. is now in Arrear; It is Ordered that the SAME be immediately paid to Her; And it is ordered that the said Allowance of 2 s. a Week be CONTINUED to be paid by the said Township of *Corbridge* to the said *Margaret Richlieu*; The said Township of *Corbridge* appearing, and not shewing sufficient Cause to the Contrary:" As by the said Order of Court is manifest and appeareth. Of which said Order, *Bartholomew Winship*, late of the Township of *Corbridge* in the Parish of *Corbridge*

in the said County Gentleman, and *William Grunwell*, late of the same Place Farmer, *Overseers* of the Poor of the Township of *Corbridge* aforesaid, afterwards, to wit on the 17th Day of *April* in the Year aforesaid, at the Township aforesaid, in the Parish and County aforesaid, had Notice; They the said *Bartholomew Winskip* and *William Grunwell*, their Duty in that Behalf not regarding, on the said 17th Day of *April* in the Year aforesaid, and continually afterwards until the Taking of this Inquisition, at the Town aforesaid in the Parish aforesaid in the County aforesaid, unlawfully, wilfully, obstinately and contemptuously did *refuse to pay* to the said *Margaret Richlieu* the said Sum of 6 l. 4 s. 6d in ARREAR, and to pay to the said *Margaret Richlieu* the said ALLOWANCE of two Shillings a Week, as by the said Order they the said *Bartholomew Winskip* and *William Grunwell* were required; Although to pay the same they the said *Bartholomew Winskip* and *William Grunwell* have often by the said *Margaret Richlieu* been requested, to wit at the Township aforesaid, in the Parish and County aforesaid: In Contempt of our Lord the King and his Laws, to the Evil Example of all Others in the like Case offending, and against the Peace of our said Lord the King his Crown and Dignity.

To this, the Defendants pleaded “that they were NOT
“GUILTY.”

This Indictment came on to be tried at the last Assizes holden for the County of *Northumberland*, before Mr. Baron *Perrot*: When it appeared in Evidence—

That at the General Quarter-Sessions of the Peace holden at *Alnwick* in and for the said County, on the 7th Day of *October* 1767, an Order was made in the Words following, that is to say—

Margaret Richlieu, Widow, *Isabell Cutter*, Widow, &c &c &c, of the Township of *Corbridge*—It appearing to this Court, that a regular *Poor-house* is established in the Township of *Corbridge*; and that the said several Persons had Each one Month's Notice given them “to go into the said *Poor-house*,” and that all Arrears of their respective Allowances were paid up to the End of the said Month; It is ordered that the said several Persons DO IMMEDIATELY GO TO AND CONTINUE IN THE SAID POOR-HOUSE, in order to their being maintained and provided for therein: And that IF they do *refuse* to go and continue in the said *Poor-house* for the Purpose aforesaid, that then the Allowance to the said several Persons from the Township do, from the Expiration of the said One Month, *cease* and be no longer payable. Given under the Seal of the Sessions, at the Sessions aforesaid.

That

That afterwards, to wit at the General Quarter-Sessions of the Peace holden at *Morpeth* in and for the said County, on the 11th Day of *January* 1769, an Order was made in the Words following, that is to say— MARGARATE RICHLIEU having an Allowance of two Shillings a Week payable to Her out of the Township of *Corbridge*, of which, the *Sum of 6l. 4s. 0d. is now IN ARREAR*, It is Ordered that the SAME be immediately paid to Her: And it is also Ordered that the said Allowance of two Shillings per Week be CONTINUED to be paid by the said Township of *Corbridge* to the said *Margaret Richlieu*; The said Township appearing, and not shewing sufficient Cause to the Contrary. Given under the Seal of the Sessions, at the Sessions aforesaid.

That the Defendants were Overseers of the Poor of the said Township of *Corbridge*; and had due Notice of the last mentioned Order.

It further appeareth in Evidence, That the Pauper was a Woman of Ninety-two Years of Age, labouring under great bodily Infirmities.

That a Poor-house had been erected at *Corbridge*, three Years before the Order stated in the Indictment.

That the Defendants, the Overseers, refused to pay the Allowance; insisting "that She should go into the Work-house, according to the Order of Suspension."

Whereupon, a Verdict was given against the Defendants; subject to the Opinion of his Majesty's Court of Kings Bench, "Whether the Defendants ought to be convicted, or not.

JA. WALLACE for the Prosecutor:
THO. WALKER for the Defendants.

THE COURT thought the General Question to be of vast Consequence to the System of the Poor-Laws: And Lord MANSFIELD expressed an Approbation of Workhouses. But they gave no Opinion, at present, upon the Merits; Holding the Sessions-Order to be bad and illegal upon the Face of it. The Sessions can't make such an Original Order. See 3 & 4 W. & M. c. 11 § 11. 9 G. 1. c. 7. § 1. 17 G. 2. c. 38. § 4. 1 Stra. 10. *Rex v. Inhabitants of Hyworth*.

PER CUR'

Let Judgment be entered for the DEFENDANTS.

Davis and Jordan v. James.

THIS was an Action against a Common Carrier, for not delivering Goods sent by him: And the only Question was, "in *whose Name* the Action ought to have been brought."

The Fact was, that *Davis* and *Jordan*, the present Plaintiffs, were Manufacturers of Cloth, at *Skipton-Mallet*. And their Declaration charged, that they being possessed of Cloth, as of their own proper Goods, delivered the same to the Defendant, being the Common Carrier &c, and requested him to deliver it safely and securely, for them, to One *Elizabeth Bowman* at the Three Nuns at *White Chapel*; which they undertook to do, for a reasonable Price payable and paid by the said Plaintiffs to the Defendant: But the Goods were lost, and never delivered. The Defendant pleaded, "Not Guilty:" And the Plaintiffs obtained a Verdict.

The Defendant's Counsel (Mr. Serjeant *Davy*, Mr. Serjeant *Burland*, and Mr. *Hotchkins*,) moved for a New Trial; Objecting that the Action ought have been brought in the Name of the *Consignee* of the Goods, and not in the Name of the *Consignors*: For that the *Consignors parted with their Property*, upon their delivering the Goods to the Carrier; and that *no Property* remained in them *after* such Delivery. And they cited, as to the Point of Property, the Case of *Knight v. Hopper*, Tr. 8 W. 3. Cases *tempore Holt Ch. J.* pa. 8. and the Case of *Godfrey v. Furzo*. 3 *Peer Williams* 185. and *Lee and others v. Prescott*, and some other Cases.

Mr. Serjeant *Glynn* and Mr. *Mansfield*, of Counsel for the Plaintiffs, answered That the present Question does not turn upon the *strict* Property. The Carrier has nothing to do with the Vesting of the Property: It does not lie in his Mouth, to say that the Consignor is not the Owner. He is the Owner, with respect to the Carrier; who has undertaken *to him*, and was *paid* by him. He was therefore Servant to the Consignor; But had no Connection at all with the Consignee. And many such Actions have been brought by the Consignor.

LORD MANSFIELD said, there was neither Law nor Conscience in the Objection. The Vesting of the Property may differ according to the Circumstances of Cases: But it does not enter into the present Question. This is an Action upon the Agreement

Agreement between the Plaintiffs and the Carrier. The Plaintiffs were to pay him. Therefore the Action is properly brought by the Persons who agreed with him and were to pay him.

(Mr. Justice ASTON, was in Chancery.)

Mr. Justice WILLES and Mr. Justice ASHHURST concurred with Lord MANSFIELD.

RULE discharged, unanimously.

Rex v. May et al' }
Rex v. Little } Freeman of Saltaſh.

THE Defendants were prosecuted by an Information in Nature of a *Quo Warranto*: And a Verdict being found against them, they moved for a New Trial. The only Question was upon the Validity of their Election.

This was originally a Burrough by Prescription; and afterwards obtained a Charter. The Charter prescribed no particular Place of Election: But the *usual Place* was the Guildhall; and the *usual Notice* was by the Ringing of a *Bell*; which used to ring at 8 o'Clock, at 9 o'Clock, and then to toll from ten o'Clock till the Time of meeting. But the Election now in question was not made at the *Guildhall*, but at an *Inn* within the Town; and was upon a *By-day*, and *without the usual Notice*; For, no Bell was ever rung at all, upon the Occasion. But all the Electors who were intitled to Notice, had *personal Notice* of this Meeting at the Inn, and of the Business to be transacted at it: And all the Electors were present, except two; and were *unanimous* in the Election. The two absent Electors did not live within Reach of Summons: And therefore, it was said, they had no Right to Notice, nor had any thing to do in this Matter.

The Counsel for the Defendants, (Mr. *Widmore*, Serjt. *Glynn*, and Mr. *Dunning*,) argued that this was a good Election; And that though the usual Notice was not given by ringing the Bell, yet it had been supplied by *other* and *better* Notice; and all who were intitled to Notice were present and concurred unanimously.

The Counsel for the Prosecution, (Mr. Serjeant *Davy*, Mr. *Wallace*, Mr. *Impey*, Mr. *Mansfield*, and Mr. *Walker*,) insisted on the Necessity of giving the *usual* Notice by ringing the *Bell*; And that *All* the Electors not being present, the unanimous Concurrence of those that were there, was immaterial, When *two* of their whole Number were absent.

The Case of *Droitwich* was mentioned, *temp. Prat. Ch. J.*

The *Ipswich* Case was also mentioned; where the Signal was by blowing a Horn.

And Sir *Christopher Musgrave's* Case, against the Mayor of *Applebee*: where, it was said to be holden, "that where there is no regular Summons, every Elector ought to be present and concur." That Election was at Public House, upon a general Invitation to drink a Glass of Wine: And the whole Transaction was sudden, unnotified, and by Surprise. See 1 *Stra.* 584. 2 *Ld. Raym.* 1358. and a fuller MS. Note of my own, *Pasch.* 10 G. 1. 1724. B. R.

LORD MANSFIELD—Nothing is more certain, than that there can not exist a valid Election, upon a *By-Day*, by *Surprise*. Notice must be given to every Member who is within the Limits of Summons. In *Corbet Kynaston's* Case, only One Member was unsummoned. And personal Summons must allow reasonable Time to the Person summoned.

But this is only where no other Method of Summons or Notice is established; as, for Instance, by a Bell, a Horn, &c.

Here, by the Usage, the Notice must be given by personal Summons to those who are within the Limits of the Burrough. But that is only *Part* of the usual Notice: There must also be a *Bell rung* at 8 and 9, and then to toll from Ten to the Time of Meeting. This can't be dispensed with: It is necessary to be complied with, unless every single Member be present, and consents to wave it. The Want of it vacates the Election.

The Rule adopted by his Lordship, and agreed to by Mr. Justice *Willes* and Mr. Justice *Aspburst*, (Mr. Justice *Aston* being in the Court of Chancery,) was, That where there is a *usual* Method of Notice, that *usual Method* can't be dispensed with, nor can the Election be good without complying with it;

it ; unless *All* the Persons who have a Right to Notice are actually summoned, and unanimously agree.

THE COURT, seeing no Reason for a New Trial,

DISCHARGED the RULE.

Harrison and Another, Assignees of the Sheriff, against
Davies and Another.

Monday 26th
November
1770.

MR. *Wallace*, on the Behalf of the Plaintiff, shewed Cause why Proceedings upon the Bail-Bond should not be stayed.

Mr. *Kenyon* had moved, on the Part of the Defendants, for this Rule, and obtained it, upon an Affidavit "that the Defendant in the Cause had been arrested, and had thereupon been admitted to Bail, and this Bail-bond entered into: after which, and before the Return of the Writ, he had surrendered himself to the Sheriff."

Mr. *Wallace* shewed this very State of the Fact disclosed by the Affidavit made in Support of the Rule, as a Reason for discharging it.

Mr. *Kenyon*, on the contrary, argued, that this was All very regular : For that the whole of the Command to the Sheriff was "that he have the Defendant's Body, at the Return of the Writ." And here he has his Body, at the Return of the Writ. And he said, there had been a late Determination in the Common Pleas accordingly. But

LORD MANSFIELD answered him, that there must have been some Difference between that Case and the present One : For that it is a settled Point, "that Nothing can be a Performance of the Condition of the Bail-bond, but *putting in Bail*."

The RULE to shew Cause why the Proceedings against the Bail should not be stayed, was DISCHARGED, with Costs.

(Mr. Justice ASTON was in the Court of Chancery.)

Rex

Rex v. Frances York and Jane Fielding.

THE Defendants were brought up by *Habeas Corpus*, directed to the Governor of *Tothil-Fields Bridewell*: Who returned a Commitment of them to his Custody, by Sir *John Fielding*.

The Writ and Return were as follows—

A HABEAS CORPUS directed “To the Governor of *Tothil-Fields Bridewell*, or his Deputy;” to bring up the Bodies of *Frances York* and *Jane Fielding*, “being committed and detained in our Prison under your Custody;” together with the Day and Cause of the Taking and Detaining &c.

The Governor returns—That before the Coming of the Writ, *Frances York* and *Jane Fielding* in the Writ named was committed to his Custody by Sir *John Fielding* Knt. ONE OF HIS MAJESTY’S JUSTICES OF THE PEACE for the City and Liberty of *Westminster*, on the Day of the Date of the said Commitment: Which said Warrant of Commitment are in the Words and Figures following—

“WESTMINSTER, to wit—To the Governor of *Tothil-Fields Bridewell*, or his Deputy. Receive into your Custody the Bodies of *Frances York* and *Jane Fielding*, and Others herewith sent You; brought before me by *Wm. Manning* and Other Constables and [&] CONVICTED, upon the Oath of *Wm. Haliburton* One of the Constables of the Parish of *St. Paul Covent-Garden*, for being loose idle disorderly Persons, of evil Fame, and Common Night-Walkers, against the Statutes &c. Them to hard Labour, UNTIL the next General Quarter Sessions of the Peace, therefore safely keep in your Custody; or until they shall be discharged by due Course of Law. Given under my Hand and Seal, this 23d day of November 1770.”

The Return of *George Smith*, Governor of *Tothill-Fields Bridewell, Westminster*.

N. B. This is an exact Copy of the Return: which does not add any Name at all, subscribed at the Bottom of the Warrant of Commitment: But the Name “*J. Fielding*” is

is set in the *Margin*, over the *Locus sigilli*; and so it is in the *Original Warrant*.

Mr. *Bearcroft* moved that the Defendants might be discharged, or at least bailed. He took three Exceptions to the Warrant of Commitment.

1st It does not describe, with sufficient Exactness and Particularity, the Epithets of loose idle and disorderly. It should have specified *what Sort* of loose idle and disorderly Persons these were: As, in a Commitment for Felony, it must be specified *what Sort* of Felony, and contain the Special Nature of the Felony; but is insufficient, if it be *only generally*, "*pro Felonia*." 2 *Hals H. P. C.* 122. The Statute of 17 G. 2. c. 5. § 1. explains the Meaning of those Words "loose idle and disorderly," used in 7 *Jac.* 1. c. 4. § 4. But the Words used in the present Warrant of Commitment are too loose and indefinite.

2d. Exception—The Commitment is also illegal, as to the *Time* during which they are to be kept in Custody. This may go beyond a *Month*: Whereas it ought to have been for a Time *not exceeding One Month*. So is 17 G. 2. c. 5. § 1. expressly.

3d. Exception—The Warrant of Commitment does not shew that Sir *John Fielding*, who made it, is a Justice of Peace, or had Power to commit these Persons. And the Court can't take judicial Notice that he was so.

The Defendants were remanded for the Present; and Ordered to be brought up again on *Wednesday* next, the last Day of the Term.

On which Day, the Defendants being accordingly brought up again,

Their Counsel relied upon the 3d Exception, as a sufficient Reason for discharging them. They cited *Dalton* 355, 383. and *v. H. P. C.* Part 1. pa. 577, 578. and Part 2. pa. 122, 123. Mr. *Bearcroft* was now supported by Mr. *Wallace* and Mr. *Dunning*.

Mr. *Lucas* was for the Prosecutor, and argued that it was enough, that the Governor of *Totbill-Fields Bridewell* had in his Return alledged the Commitment to have been made by One of his Majesty's Justices of Peace &c: And that, after Conviction,

it was not necessary that it should appear *upon the Warrant* of Commitment, that the Person who made it was a Justice of Peace. This may be supplied by Averment.

LORD MANSFIELD observed, that this was upon a Conviction: And it ought to be shewn that the Person convicting had *Authority* to Convict. It is a Commitment in *Execution*; And the Authority of the Person committing them ought to be shewn: whereas here it does not even appear *by whom* they were convicted; It is only said in the Warrant, "brought before Me, "and convicted." The not shewing before whom they were convicted, is a gross Defect. Let them be discharged.

DEFENDANTS DISCHARGED.

Wednesday
28th Nov.
1770.

An *Attachment* for Non-payment of Costs taxed and liquidated, may be moved for, on the *LAST Day of a Term*.

Mr. *Widmore*, this Day, moved for and obtained such a Rule.

V. ante, pa. 651. accord. So also, for an Attachment against a Sheriff, for not returning a Writ. *V. ibidem*. *V. ante*, 2502. *Jacob's Case*.

Rex v. Almon.

THE Defendant having been convicted of Publishing a Libel, (*Junius's Letter*;) in One of the Magazines called the *London Museum*; which was bought at his Shop, and even professed to be "*printed for Him*;"

His Counsel moved, on *Tuesday* 19th *June* 1770, for a New Trial; upon the Foot of the Evidence being insufficient to prove any *Criminal Intention* in Mr. *Almon*, or even the least *Knowledge* of their being sold at his Shop. And they had Affidavits to prove, that it was a frequent Practice in the Trade, for One Publisher to put another Publisher's Name to a Pamphlet, as printed for that other, when in fact it was published for himself. That this was the Fact in the present Case; Mr. *Miller* being the real Publisher of this Museum, but having advertised it and published it as printed for Mr. *Almon*, without consulting Mr. *Almon*, or having his Consent or Approbation. That, on the contrary, as soon as he saw his Name put to it as being printed for him, he immediately

mediately sent a Note to Mr. *Miller*, expressing his Disapprobation and Dissatisfaction. That he himself had no Concern whatever in this *London* Museum. That he was not at Home when they were sent to his Shop. That the whole Number sent to his Shop was 300. That about 67 of them had been sold there, by a Boy in the Shop, but without Mr. *Almon's* own Knowledge, Privity, or Approbation. That as soon as he discovered it, he stopt the Sale, ordered the Remainder to be carried up into his Garret, and took the first Opportunity to return them to Mr. *Miller*. That it was not proved, that the Person who sold them was Mr. *Almon's* Servant, or employed by him; or that Mr. *Almon* was at all privy to the Sale.

On *Wednesday* 27th *June* 1770, it came on again; And,

Serjeant *Glyn* argued that the Proof against Mr. *Almon* appeared therefore to be defective: There was nothing to constitute Criminality, or induce Punishment.

That after the Jury had been out about two Hours, One of them (Mr. *Mackworth*) proposed a Doubt “Whether the bare Proof “of the Sale in Mr. *Almon's* Shop, *without* any Proof of Privity, “Knowledge, Consent, Approbation, or *malus Animus*, in Mr. “*Almon* himself, was sufficient in Law to convict him criminally of publishing a Libel.”

Mr. *Mackworth* understood his Lordship's Answer to this Doubt to be this—“That this was conclusive Evidence.” Otherwise, “Mr. *Mackworth* was convinced in his own Mind, that the Defendant ought not to be found guilty, upon this Evidence; nor would he have found him guilty. He certainly gave his Verdict under a Mistake. If he had apprehended that the Jury were at Liberty to exercise their own Judgment, he would have acquitted the Defendant. The Serjeant prayed that Mr. *Mackworth's* Affidavit might be read.

LORD MANSFIELD—You know, it can't be read.

Mr. Justice ASTON—A Juryman's Affidavit with regard to his Sentiments in Point of Law, at the Trial, ought not to be admitted; whatever may be the Case of his Affidavit tending to rectify a Mistake in Fact.

LORD MANSFIELD, in reporting the Evidence, said He had told the Jury, that there was Evidence of the Publication, if they believed the Witnesses. And he said, he had directed them,

them, (as he always had done, and as he took the Law to be,) that if they were not satisfied that the Blanks were filled up in the Information, in the *true* Sense and Meaning of the Writer, they ought to acquit the Defendant: And that the Epithets used in the Information were Inferences of Law, drawn from the Paper itself; and not Facts to be *proved*.

THE COURT were of Opinion, that None of the Matters urged on Lehalf of the Defendant, nor All of them added together, were Reasons for granting a New Trial; whatever Weight they might have in Extenuation of his Offence, and in consequence lessening his Punishment. For, they were exceedingly clear and unanimous in Opinion, That this Pamphlet being bought in the Shop of a common known Bookseller and Publither, importing by its Title-Page to be printed for him, is a sufficient *primâ facie* Evidence of its being published by him; Not indeed conclusive, because he might have contradicted it, if the Facts would have born it, by contrary Evidence. But as he did not offer any Evidence to repell it, it must (if believed to be true) stand good *till* answered, and be considered as conclusive, till contradicted.

LORD MANSFIELD said and repeated, that Mr. *Mackworth* had understood him perfectly right: And he was very glad to find that there was no Doubt of what he had said. The Substance of it was, that in Point of Law, the Buying the Pamphlet in the Public open Shop of a known professed Bookseller and Publisher of Pamphlets, of a Person acting in the Shop, *primâ facie* is Evidence of a Publication by the Master himself; but that it is liable to be contradicted, where the Fact will bear it, by contrary Evidence tending to exculpate the Master, and to shew that he was not privy nor assenting to it nor encouraging it. That this being *primâ facie* Evidence of a Publication by the Master himself, it stands good *till* answered by him: And if not answered at all, it thereby *becomes conclusive* so far as to be sufficient to convict him. That Proof of a Public exposing to Sale and selling, at his Shop by his Servant, was *primâ facie* sufficient; and must stand *till* contradicted or explained or exculpated by some other Evidence; and if not contradicted explained or exculpated, would be in Point of Evidence sufficient or tantamount to conclusive. Mr. *Mackworth's* Doubt seemed to be, "Whether the Evidence was sufficient to convict the Defendant, in case he believed "it to be true." And in this Sense I answered it. *Primâ facie*, 'tis good; and remains so, till answered. If it is believed, and remains unanswered, it becomes conclusive. If it be sufficient in Point of Law, and the Juryman believes it, he is bound in Conscience to give his Verdict according to it.

In Practice, in Experience, in History, in the Memory of all Persons living, This is (I believe) the first Time that it was ever doubted "that this is good Evidence against a " Bookseller or Publisher of Pamphlets." The constant Practice is, to *read* the Libel, as soon as ever it has been proved to be bought at the Defendant's Shop. This Practice shews that it is considered as *already proved upon the Defendant*: For, it could not be read against him, before it had been proved upon him.

If I am mistaken, I am entirely open to alter my Opinion, upon being convinced that it is a wrong one: But, at present, I take this Point to be as much established, as that an Eldest Son is, (in general) Heir to his Father. And being Evidence *prima facie*, it stands (if believed) till contrary Proof is brought to repell it.

Mr. Justice ASTON laid down the same Maxim, as being fully and clearly established, "that this *prima facie* Evidence (if believed) is binding till contrary Evidence be produced." Being bought in a Bookseller's Shop, of a Person acting in it as his Servant, is such *prima facie* Evidence of its being published by the Bookseller himself: He has the Profits of the Shop, and is answerable for the Consequences. And here is a corroborating Circumstance; namely, that it professes to be printed *for* him. It is as strong a Case as could be put. The Sale in his Shop is sufficiently proved: And he is answerable for what is done in his Shop. And here is no Sort of Proof produced in Contradiction or Exculpation. This *prima facie* Evidence, not answered, is sufficient to ground a Verdict upon: And there appears no Reason for granting a New Trial. If he had a sufficient Excuse, he might have shewn and proved it. But he has not attempted to prove Exculpation or Excuse: Therefore the Evidence of his Publishing what was thus bought in his Shop must stand till the Contrary appears. There may indeed be Circumstances of Extenuation, or even of Exculpation; and if it were a Surprise upon him, the Court would have Regard to such Circumstances, as far as they merited their Regard: But here was no Kind of Proof, of any such Sort.

He cited *Benjamin Harris's Case*, in State Trials, V. 2. pa. 1037. *Rex v. Straker*, H. 3. G. 1. and *Rex v. Elz. Nutt*, H. 2. G. 2. *Fitz-Gibbons* 4.

Mr. Justice WILLES was also of Opinion that there was no Foundation for the Motion for a New Trial; and that, upon

on all the Circumstances of this Case, Mr. *Almon* was answerable as Publisher of the Libel. He is a common known Book-teller and Publisher; and it imports, upon the Face of it, to be printed for him; and it was bought in his Shop. This is sufficient *prima facie* Evidence of his Privity: And no Contrary Evidence was produced by him. It was liable to be refuted or explained: But as it never was, nor any Excuse shewn, it stands good to convict him.

Mr. Justice ASHHURST entirely concurred with his Lordship and the Rest of his Brethren, in the Doctrine they had laid down; and in holding that there was not any Foundation for granting a New Trial: And he particularly expressed his Approbation of Lord *Mansfield's* Answer to Mr. *Mackworth*, the Juryman.

THE COURT therefore unanimously DISCHARGED the Rule to shew Cause why there should not be a New Trial.

The Defendant's Counsel declined making any Use of the Liberty which had been reserved to them, of moving in Arrest of Judgment.

Crooke and Another, Executor, against Davis.

THE THREE JUDGES, after Lord *Mansfield* was gone, determined an Affidavit made to hold the Defendant to Bail, to be insufficient for that Purpose. It had *but One Stamp*; and it joined together an Action of *Debt* on Bond (for 800*l.*) and an *Assumpsit* (for 150*l.*) on Promises.

Mr. *Dunning* objected, on behalf of the Defendant, that Debt and Assumpsit could not be thus joined in the same Affidavit; and, moreover, that it was a Fraud upon the Stamp-Duty.

Mr. *Cox*, for the Plaintiffs, claimed a Right to make his *Election*, at least; and to hold the Defendant to Bail upon *One* of the Actions, if he could not do it upon *Both*.

Mr. *Dunning* argued that that could not be permitted.

THE THREE JUDGES discharged the Defendant upon *Common* Bail, in *both* the Actions, for this Impropriety of joining them in the same Affidavit: But they did not lay much Stress upon the Objection of its being a Fraud on the Stamp-Duty.

DISCHARGED on Common Bail.

The End of *Michaelmas* Term 1770, 11 Geo. 3.

Hilary

Hilary Term

11 Geo. 3. B. R. 1771.

In this Term, Great Alterations happened, both upon the Bench, and at the Bar.

ON the First Day of it, the Great Seal (Lord *Mansfield* having again declined accepting it,) was delivered by the King to the Lord Commissioner BATHURST, as Lord CHANCELLOR of *Great Britain*; who was, upon this Occasion, made a Peer, by the Title of Baron of *Apsey* in *Suffex*.

A Day or two after, Sir *John Eardley Wilmot* resigned his Office of Chief Justice of the Common Pleas: And Mr. *De Grey*, his Majesty's Attorney General, succeeded him.

Edward Thurlow Esq; Solicitor General succeeded Ld. Ch. J. *De Grey*, as Attorney General: And *Alexander Wedderburne* Esq; was made Solicitor General.

George Nares Esq; One of the Kings Serjeants was knighted, and made a Judge of the Court of Common Pleas.

Mr. *Gryffith Price*, Mr. *Perrin*, and Mr. *Skynner* were made King's Counsel; and Serjeant *Leigh*, King's Serjeant.

Hutchinson, Executrix, v. Brice.

THE COURT refused to set aside a Nonfuit voluntarily suffered by the Plaintiff, and to give him Leave to reply *de novo*. He had replied, "that the Cause of Action arose within six Years:" which Fact he could not prove. He wanted, therefore,

therefore, to set aside the Nonsuit, and reply *de novo*: which, if he had succeeded in, he would have replied, "that the *Writ of Latitat* issued within the six Years. But

THE COURT said, that that would make a quite new Question; which the Plaintiff had before pretermitted, and had put the Issue upon quite another foot, and upon a Point which he could not establish.

RULE DISCHARGED.

Mr. *Dunning* was for the Motion; Mr. *Wallace*, against it.

V. ante, *Robinson v. Raley*, P. 1757, 30 G. 2. in my 1st. Vol. pa. 316. to 323. and also *Alder v. Chip*, H. 1759, 32 G. 2. in my 2d. Vol. pa. 756.

Burchall v. Ballamy.

Friday 1st.
Feb. 1771.

THIS Cause had formerly gone down to Trial; and went off, upon a *Reference* to Arbitrators: But the Arbitrators never made any Award. The Cause, thereupon, went down to Trial, a second Time: When the Plaintiff prevailed, and obtained a Verdict.

Mr. *Mansfield* moved, on behalf of the Plaintiff, for the Court's Direction to Mr. *Benton* "to allow the Plaintiff the Costs of going to Trial at the former Assizes;" as the Event of the Arbitrators having made no Award had rendered it necessary for the Plaintiff to go down to Trial a second Time, and he had prevailed in it. He argued that as this Case was exactly similar to that of a Cause's going off as a *Remanet*, in which last Case, Costs are always paid; * so therefore ought they in this Case.

* V. ante, Vol. 4. pa. 1937. and p. 1988, in *margin*.

Note—It was said, and not contradicted, that before this Time, it was the Course of the Court of King's Bench, and had also (till very lately) been the Course of the Common Pleas, to allow the Costs of a former going down to Trial, in that † *single Case only*, of a Cause's going off as a *Remanet*: But the Court of Common Pleas, about three or four Years ago, extended it (by a Direction given to their Prothonotaries) to other similar Cases which fell within the same Reason.†

† V. ante, 1937. and 1988. *Sauler v. Evans*

‡ V. ante, *ut supra*, p. 1988. in *margin*.

The Counsel for the Defendant therefore answered Mr. *Mansfield*, That though the Court of *Common Pleas* had recently thought fit to extend this Allowance of Costs to other Cases of

the like kind with *Remanets*, yet *this* Court had always *confined* it to the *single* Case of the Cause's going off upon a *Reman*, and had never allowed it in *any* other, how similar soever it might appear.

THE COURT, (in order to make the Practice of the two Courts correspond,) directed that *for the future*, in *all* Cases where a Cause goes down to Trial, and goes off, upon *any* Occasion, without the Fault, Contrivance or Management of the Parties, and is afterwards brought down again to Trial; the Costs of such former abortive going down to Trial shall be taxed and allowed to the Party finally prevailing, in the same manner as if the Cause had gone off upon a *Remanet*.

However, they did not think it right to include the present Motion in the Directions which they gave for future Cases, nor to allow the present Plaintiff the Costs he applied for; because the Practice of *this* Court had hitherto been against it.

Therefore Mr. *Mansfield* took Nothing by his Motion: (though he had the Merit of thus contributing to the Settling of the Practice for the future.)

John Wilkinfon—Plaintiff
and
Richard Colley—Defendant.

Shropshire THIS was an Action in Debt on the *Stat. 4*
(to wit) *Geo. 2. Chapter 28*: and the third Count in the Declaration set forth

THAT on the 25th day of *March* 1768, Plaintiff demised to Defendant a certain Messuage or Tenement and Lands with the Appurtenances, situate, lying and being in the Parishes of *Brosely* and *Barrow* in the County aforesaid. To have and to hold the Premises within the Appurtenances to Defendant, from thenceforth for and during the Space of one whole Year, from thence next ensuing and fully to be compleat and ended; Yielding and paying to Plaintiff for the same the Sum of 106 *l.* by Equal Portions half yearly (that is to say) on the 29th Day of *September* and the 25th Day of *March* then next following: by virtue of which Demise Defendant afterwards, to wit, on the 26th Day of *March* 1768, Entered into the Premises with the Appurtenances belonging to Plaintiff. And Plaintiff further says that he, after the making of the said Demise, and during the Continuance

ance thereof, (that is to say) on the 7th Day of *May* 1768, Defendant then being in Possession of the Premises with the Appurtenances by virtue of the said Demise, and the Reversion thereby belonging to Plaintiff as aforesaid, at *Broseley* aforesaid, by one *Henry Mytton* the Agent of Plaintiff thereunto lawfully authorized, made a Demand of, and gave Notice in Writing to Defendant for delivering up the Possession of the said demised Premises on the 25th of *March* then next following. And Plaintiff further says that he, by his said Agent, afterwards, to wit on the 26th of *March* 1769, at *Broseley* aforesaid, demanded of Defendant that he would deliver up the Possession of the Premises to Plaintiff according to said Notice. Nevertheless Defendant did not then and there deliver up the Possession of the said last mentioned demised Premises to Plaintiff; but to deliver the same to Plaintiff altogether neglected and refused, and wilfully held over the same from Plaintiff for a long Space of Time, to wit for the Space of 14 Months then next following. And Plaintiff doth aver that the demised Premises at the said Time of the holding over the same were of the yearly Value of 50*l.* and by reason of such withholding and holding over the said demised Premises with the Appurtenances from Plaintiff, and by Force of the Statute &c, an Action hath accrued to Plaintiff to demand and have of Defendant 350*l.* (that is to say) at the Rate of double the yearly Value of the said demised Premises with the Appurtenances aforesaid. .

To which Declaration the Defendant pleaded the General Issue; and, Issue being joined, this Cause came on to be tried at the last Assize held for the County of *Salop.*

It appeared in Evidence, that *Thomas Stanley* late of *Buildwas*-Abbey in the County of *Salop* deceased was at the Time of his Death possessed of the Premises mentioned in the Declaration, being Leasehold, for a Term of Years subsisting; and by his Will bequeathed the same to Trustees, of whom the Plaintiff was one and is the Survivor; In Trust for the Children of his Brother *John Stanley*, who then were and still are Infants; and appointed Plaintiff Executor of his Will.

That Plaintiff, as his Executor, took the Possession of the Premises; and continued to receive the Rents and Profits, until 25th *March* 1767.

That a Bill was filed in the High Court of Chancery, on the Part of the Infant Children of the said *John Stanley*, against the

the Plaintiff; for an Account of the Rents and Profits the Premises received by him: who was decreed to account and to pay Costs.

That by an Order made in the same Court, bearing date the 13 Feb. 1766, *Henry Mytton* was appointed the Receiver of the Rents and Profits of the Premises; and with Liberty to let and set the same, with the Approbation of the Master, as there should be Occasion.

That Defendant was Tenant of the Premises, for a Term of Years which expired on the 25th of *March* 1769, at the Yearly Rent of 106*l*.

That Defendant paid the Rent for the Premises to Plaintiff, as Executor, to the 25th *March* 1767; and from that Time, to the 25th *March* 1769, to the said *Henry Mytton*, the Receiver.

That a Notice in Writing, signed by the said *Henry Mytton*, was delivered to Defendant, on the 7th of *May* 1768, in the Words and Figures following: "Mr. *Richard Colley* I hereby give you Notice to quit the Lands and Tenements you hold at *Swinney* in the Parishes of *Br-fley* and *Barrow* and County of *Salop*, of which I am appointed Receiver by the Court of Chancery, at *Lady-day* next. And I do hereby give you Notice, not to commit any Waste Havock or Destruction on the Premises, and not to sell any Hay Straw Compost or Manure from off the same, as you will answer the same at your Peril. Your Humble Servant *Henry Mytton*, *Cleobury*, 7th *May* 1768. To Mr. *Richard Colley* at *Swinney*."

That on Application to the Court of Chancery, an Order was made in the said Cause, on a Suggestion that the Defendant had refused to quit the Possession, that Plaintiff in said Cause might be at Liberty to bring an Action against the Defendant for double Rent, in the Name of the Plaintiff, against the Defendant.

That the Defendant did not quit the Possession of the Premises, in pursuance of the above Notice, at the Expiration of his said Term; but held over the same, for the Space of 14 Months then next following.

It appeared in Evidence, that a Demand was made of the Possession of the Premises, after the actual Suing out of the Writ: And no other Evidence was given, of any other Demand being made subsequent to the Notice to quit.

That the Premises are of the yearly Value of 127 l. and Defendant is still in Possession thereof.

The Jury find a Verdict for the Plaintiff, on the third Count in the Declaration; subject to the Opinion of the Court, Whether under the Circumstances of this Case, the present Action can be maintained against Defendant for double the yearly Value of the said Premises, for the Time that Defendant held over the said Premises after the Expiration of his said Term.

IL. *Keynon* for Plaintiff.

The Defendant's Counsel raised several Objections to the Plaintiff's recovering the double yearly Value, in this Action; and endeavoured to shew that the Circumstances required by this Act of Parliament had not been complied with. The Act * directs * V. Sec. 1. " that the Persons wilfully holding over, after the Determination " of the Term or Terms, and after *Demand* made, and Notice in, " Writing given, for delivering the Possession, by his or their " Landlord or Lessors, or the Person or Persons to whom the " Remainder or Reversion shall belong, his or their Agent or " Agents thereunto *lawfully authorized*, shall pay at the Rate " of double the yearly Value, for so long Time as the Lands &c, " are detained; to be recovered by Action of Debt &c: Against " the recovering of which said *Penalty*, there shall be no Relief in Equity."

1st. This Notice was not given by the Landlord, nor by any Agent of his *thereunto lawfully authorized*. It was given by Mr. *Mytton* alone, the Receiver under the Order of Chancery; without mentioning the Landlord at all. But Mr *Mytton* had no Authority to turn out the Tenants: He was only appointed Receiver of the Rents and Profits, with Liberty to let and set the Premises with the Approbation of the Master. The Order does not empower him to do any thing more than that. He is not, therefore, within the Words or Meaning of this Statute, an Agent lawfully authorized to give Notice for delivering Possession. And as this is a *Penal* Act, the Order of Chancery can give no Assistance towards recovering the Penalty.

2d. A *Demand* was necessary, as well as Notice in Writing: 2d Objection. The Words are " after Demand made, and Notice in Writing, " for delivering the Possession." The Demand is independent of the Notice. The Declaration indeed alledges a Demand: But

it was not sufficiently proved. There was no Demand previous to the bringing of the Action. The only Evidence was, "that a Demand was made of the Possession of the Premises, after the actual Suing out of the Writ." Now a Demand *subsequent* to the Action is no Demand at all.

3d Objection. As the Notice was "to quit the Possession at a fixed Time," Somebody ought to have attended, to receive it.

Mr. *Kenyon*, Counsel for the Plaintiff, was beginning to answer these Objections; but was stopped by the Court, as they thought it a plain Case on his Side, and were unanimous in that Opinion.

They held that the Receiver was an Agent for the Landlord, lawfully authorized for this Purpose; and that the Notice in Writing was itself a sufficient Demand. They held this to be a *remedial* Law: The Penalty is given to the Party aggrieved

RULE—Let the POSTEA be delivered to the PLAINTIFF.

Mr. *Kenyon*, in Answer to the first Objection, cited 3 *Atkyns* 350. *Pitt v. Snowden*; where *Ld. Hardwicke* said "that a Receiver had a Power to *distrain* for "Rent, without first applying "for a particular Order for that Purpose."

Mr. *Bearcraft*, who made the Objection, said, that that Case did not apply to the present, nor clear it from his Objection: It did not prove that a Receiver had Power to turn out the Tenants.

Monday 11th
February
1771.

Purdy v. Stacey.

THIS was a Motion in Arrest of Judgment, after a general Verdict for the Plaintiff in an Action for Defamatory Words, charging the Plaintiff with having given 200 *l.* for a Warrant to be *Purser of a Man of War*, (the *Magnanime* :) but they did not specify, *to whom* he gave the Money.

Serjeant *Davy* and Serjeant *Glynn* objected, that the Words are not actionable. This Office was saleable at Common Law: And it is not within the 5 & 6 *Edw. 6.* or any other Way pro-

prohibited. They cited 2 *Vernon* 308. *Symonds v. Gibson* where; the Court of Chancery said they could not set aside the Bonds: but they relieved against four Bonds entered into for the Defendant's quitting his Pretence to the Purser'ship of One of the King's Men of War, and procuring the Obligor to be admitted to it; upon Payment of the Principal Money, without Interest or Costs. They also cited *Law v. Law*, reported in 3 *Peere Williams* 391. and in Mr. *Forrester's Reports* 140. in which Case, the Lord Chancellor *Talbot* said "The Case of *Beresford v. Done* 1 *Vernon* 98, " related to a Commission in the Army, and no Law prohibits " the Sale of such, no more than it does that of Purser of a Ship; " which was *Symonds v. Gibbons*, 2 *Vernon* 308." There is no Trust of any public Kind, either Civil or Military, annexed to this Office: The Purser is nothing more than a *Sutler*.

But even supposing the *Selling* this Office to be an Offence, yet the *Buyer* would not be an Offender. The simple Buying of an Office is not criminal.

Here is no Crime charged upon the Plaintiff, nor any thing that affects his Credit.

Mr. *Wallace* and Mr. *Dunning*, *contra*, on behalf of the Plaintiff, argued that this is a Public Office; an Office of Trust and Confidence, having the Disposition of the King's Stores; and that the buying and selling it must be prejudicial to the King's Service. They cited 1 *Hawkin's pl. cap. 67.** to prove the Criminality of taking or giving a Reward for Offices of a public Nature. A Seller can't exist, without a Buyer. The Buying is the Temptation to the Crime of Selling. If one is criminal, the other is so too. This Imputation was slanderous, therefore, upon the Plaintiff, and actionable: And there is no Reason to arrest the Judgment. As to the Cases cited, they disputed their Application to the present Case. It appears upon the present Declaration, that this is an Office of Trust, in the Disposal of the Lords of the Admiralty by Warrant: And the Plaintiff is charged with having given 200 *l.* for this Warrant. This Charge must therefore be understood, " that he bought it of Those Persons in whose Disposal " it was;" that is, of the Commissioners of the Admiralty. Section 3.

THE COURT, upon this Argument on Friday 8th February, had a Doubt concerning the Construction of the Words of the Declaration, viz. Whether they imported that Mr. *Purdy* gave the Money to the Commissioners of the Admiralty, for this Warrant. If the Words had clearly imported that he gave Money to the Commissioners themselves, who had the Disposal of the Warrant, they had no Doubt but that would have

have been a Corruption of a Public Trust, and a Crime both in the Commissioners and the Person tempting them to such Corruption: And consequently the Words would have imported a Criminal Charge, and been actionable. They therefore took a few Days for their further Consideration.

And now LORD MANSFIELD declared their Opinion that the Charge was so loose, that it did not of itself import a Crime: And Nothing can be intended; no Averment of the Meaning if the Words, by an *Innuendo*. If the Plaintiff does not shew that the Words are actionable, that Defect can't be supplied. Now here is Nothing that shews *to whom* this Money was given: And as it is not averred, We can't intend it. If the Commissioners of the Admiralty were to take Money for their Warrant to appoint a Person to be Purser, it would be criminal in the Corrupter and Corrupted. But there are Cases where it may not be unlawful to give Money to other Persons. In the present Case, it is defectively laid, and does not appear to be Defamation or a Charge of any indictable Crime. Therefore

JUDGMENT must be ARRESTED.

Saturday 9th
February
1771.

Rex *versus* Inhabitants of Great Broughton.

THIS was a Writ of Error directed to the Justices of Peace of the County of *Cumberland*, upon a Judgment given by the General Quarter Sessions of that County, in an Indictment against the Inhabitants of the *Division* of *Great Broughton* in the Parish of *Bridekirk*, for *not repairing a Highway* in the said Parish; whereof the said Inhabitants of the said *Division* were indicted and convicted. The Indictment is in the Common Form; Alleging that there is, and was from the Time whereof the Memory of Man is not to the contrary, a Common and ancient King's High-way for all the King's Liege Subjects &c, leading from *Flimby Parts* and *Woodside* to the Market-Town of *Wigton* in the said County; and that a certain Part of the same King's Common Highway, at the *Parish* of *Bridekirk* in the County aforesaid, between a Rivulet &c and a certain &c, (particularizing its Length and Breadth,) on the 26th of *June* &c, and continually afterwards &c, was and yet is very ruinous &c; And that the *Inhabitants of the Division* of *Great Broughton* in the Parish of *Bridekirk* aforesaid the Common Highway aforesaid (so as aforesaid being in Decay) from the Time whereof the Memory of Man is not to the contrary, *ought to repair and amend*, when and so often as it shall be necessary.

Upon "Not guilty" pleaded, the Jury found a Verdict, "that
" the said Inhabitants of the said *Division* of Great Broughton
" are guilty of the Premises &c."

The Judgment of the Quarter-Sessions is, That they do
forfeit to the King, by Occasion of the Nuisance aforesaid
in not repairing the King's Highway aforesaid, the Sum of
100 l.

The Assignment of Error is (*inter alia*,) That it is not shewn
or alledged in the Indictment, that the Inhabitants of this Division
of Great Broughton have used and been accustomed and of Right ought
to repair and amend this Highway; or in *what Right*, or for
what Cause, by *what Obligation*, or upon *what Account* they ought
to repair and amend the same.

Mr. Mansfield, on behalf of the Defendants, objected That by
Common Law, exclusive of Custom, Prescription &c, the In-
habitants of a particular *Division* of a Parish, are NOT bound to
repair: And here is no Custom, Prescription, or particular Rea-
son shewn, for obliging them to repair this High-way. It is
only alledged, in general, "that they ought to repair and a-
mend it, when and so often as it shall be necessary."

Mr. Davenport, *Contra*, argued that it was sufficiently charged
as a Prescription: It is charged "that from the Time whereof
" the Memory of Man is not to the contrary, they ought to
repair and amend it, when and so often as it should be necessary.
Technical Words are not necessary: A Prescription may be by
Implication; as, particularly, *ratione tenuræ*. He cited *Tremaine*,
199. 201. 202. 1 *Ventris* 341. & 1 *Siderfin* 140.

Mr. Mansfield replied, that it is not alledged that they have im-
memorially repaired. This is a Defect in substance. Prescrip-
tion and *ratione tenuræ* are distinct Things. The Cases cited
do not support this Indictment.

LORD MANSFIELD was not in COURT.

Mr. Justice ASTON. It don't appear that the Inhabit-
ants of this *Division* are bound to repair this Highway. By
Common Law and of Common Right, the Inhabitants of the
Parish at large are bound to repair the Highways: And here
is no Reason shewn why this particular Division should be ob-
liged to do it.

VOL. V.

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Mr.

Mr. Justice WILLES concurred with his Brother *Aston*; and said that it ought to appear upon the face of the Indictment, by *what Right* the Charge was laid upon this particular Division.

Mr. Justice ASHHURST was of the same Opinion. If You lay a Charge upon Persons against Common Right, You must shew *how* they are bound. It is not enough, to shew that they immemorially *ought* to repair: It should be shewn, that they *have* repaired. He mentioned the Case of *Weston* under *Penyard* (which see, *ante*, Vol. 4. pa. 2507.) where it was holden that the Repair of Highways lies, of Common Right, upon the whole Parish: but as that Parish lay within two distinct Counties, an Indictment might be brought against that Part of it in which the ruinous Road lay. There the Indictment was not against a particular Precinct or Division of the Parish, (as the present One is;) but against the *Whole* of the Parish that lay within the County of *Gloucester*, in which that Indictment was brought.

THE COURT therefore held this Indictment to be bad; and unanimously reversed the Judgment.

JUDGMENT REVERSED.

The End of *Hilary* Term 1771, 11 Geo. 3.

Easter

Easter Term 1771

11 Geo. 3. B. R.

White v. Barber.

Tuesday 23d
April 1771.

This was a Case out of Chancery ; stated as follows—

BETWEEN

[Robert White and Eleanor his
Wife, (which said Eleanor was
the Widow and Devisee of Ed-
ward Presgrave deceased,) Edward
Presgrave and John Presgrave In-
fants, (who are the two surviving
Sons and only Children of the
said Edward Presgrave deceased,)
by the said Robert White their
next Friend, Plaintiffs ;
And

[Thomas Barber, John Presgrave,
John Pare, Edward Presgrave
Cham, William Cham, Edward
Presgrave, and Thomas Cham,
Defendants.

EDWARD PRESGRAVE, being seized and pos-
sessed of a very considerable Real and Personal Estate,
did on or about the 20th *October* 1753, duly make his
Will in Writing, and thereby gave and devised to *Elean-
nor* his Wife the several Freehold and Copyhold Premises therein
particularly mentioned, (which said Copyhold Premises he had
previously

previously surrendered to the Use of his Will;) To hold the same unto the said *Eleanor* until his son *Thomas Presgrave* should attain the Age of twenty-one Years; In Trust nevertheless that she should educate and maintain him till that Time, out of the Rents and Profits of the said Premises: and then he devised the same to his said Son *Thomas* in Fee. But if it should happen that his said Wife should be enstent with one or more Children at the Time of his Decease, and his said Son *Thomas* should die without Issue before he attained the Age of twenty-one Years, such Child or Children being then living, He then devised the said Premises to his said Wife till such Child or Children should attain his her or their Ages of twenty-one Years; In Trust nevertheless that she should educate and maintain such Child or Children till that Time, out of the Rents and Profits of the said Premises: And then he devised the same to such Child or Children in Fee. But if it happened that his said Son *Thomas* should die without leaving Issue of his Body, and before he attained the Age of twenty-one Years, or that his said Wife should at the Time of his the said Testator's Decease be enstent with one or more Child or Children who should die without leaving Issue of his her or their Body or Bodys, before he she or they attained their Age or Ages of twenty-one Years, Then he devised the said Premises to his said Wife for the Term of her natural Life; and from and after her Decease, then as to Part of the said Copyhold Premises, he devised the same to his Nephew the Defendant *Edward Presgrave Cham* in Fee; And the other Part of his said Copyhold Premises he devised to his Nephew *Thomas Barber* in Fee: But if he should die without lawful Issue of his Body, Then he devised the said Premises to the right Heirs of *John Cham* and *Mary* his Wife, (both deceased,) in Fee. And as to the Residue of the said Freehold and Copyhold Premises; he devised the same to his Nephew the Defendant *William Cham*, to his Godson the Defendant *Edward Presgrave*, and to his Nephew the Defendant *Thomas Cham*, in certain Proportions, in Fee.—

The Testator gave to his said Wife 300*l.* and all his Plate, household Goods and household Furniture of what kind soever. He also gave to his Nephew *Thomas Barber* 50*l.* To *Elizabeth Thompson* an Annuity of 1*l.* 4*s.* 0*d.* To *John Presgrave* an Annuity of 1*l.* 10*s.* And subjected his Personal Estate to the Payment thereof; and directed a Branch of the same Size Fashion and Value as that in *Bourn Church* should be hung up and placed in *Langtoft Church*, the Charges whereof he directed should be paid out of his Personal Estate; And gave all the Residue and Remainder of his Goods Chattels and Personal Estate of what Nature or Kind soever

ever and wheresoever, after Payment of his Debts Legacies and Funeral Expences and the said several Annuities and other Payments with which he had charged his Personal Estate, to certain Trustees in his Will named, in Trust for the Sole and only Use and Benefit of his said Son *Thomas*, to be paid him at the Age of twenty-one Years; and thereby appointed said Trustees, Executors and Trustees of his said Will for the Uses and Purposes aforesaid. But if it should happen that his said Wife should at the Time of his Decease be ensient with one or more Child or Children, Then and in such Case he bequeathed all the said Residue and Remainder of his Personal Estate, subject and chargeable as aforesaid, to his said Executors in Trust for such Child or Children as his said Wife should happen to be ensient with at his Death; to be paid to such Child when He or She should attain his or her Age of twenty-one Years; and if more than one Child, then to be equally divided amongst them Share and Share alike, to be paid to them at their respective Ages of twenty-one: And in that Case, the said Testator appointed the said Trustees Executors and Trustees of his Will for the Purposes aforesaid. But if it should happen that his said Wife should not be ensient with one or more Child or Children at the Time of his Decease, or that his said Son *Thomas* should die before he attained his Age of twenty-one Years without Issue of his Body, or that his Wife should at his Decease be ensient with one or more Child or Children and such Child or Children should happen to die before He She or they should attain their respective Age of twenty-one without Issue of his her or their respective Body or Bodies, then and in every of the said Cases he thereby gave and bequeathed to his Nephew *Thomas Barber* all the said Residue of his Personal Estate; he paying all his Debts, Legacies, Funeral Expences and the several Annuities and other Payments with which he had charged his said Personal Estate. And in such Case the said Testator appointed the said *Thomas Barber* Sole Executor of said Will; and thereby directed that if the said *Thomas Barber* should become intitled to his said Personal Estate, according to the several Directions therein before mentioned, he should pay thereout several Legacies in his Will particularly mentioned, and in such manner as therein is particularly mentioned, amounting to 770*l.* and an Annuity of 2*l.* therein also mentioned.

The Testator, at the Time of making his said Will, had only one Child, the said *Thomas*: But after the making thereof, and before his Death, he had two other Sons born, *viz.* the Plaintiffs *Edward* and *John*.

On the 12th of *January* 1759, the said Testator *Edward Presgrave* died, without altering or revoking his Will; leaving Issue three Children, the said *Thomas Presgrave*, who died without Issue in *August* 1766; and the said *Edward Presgrave* and *John Presgrave*, Infants of tender Years, who were born after the making of the Will, in the Testator's Life-time, and who are still living, and who are not provided for, unless they take by this Will.

The said *Eleanor* is still living; but was not enstient at the Time of the Testator's Death.

The Plaintiffs brought their Bill in the Court of Chancery (amongst other things) for an Account of the Personal Estate of the said Testator; and to have the Surplus thereof placed out for the Benefit of the two Infant Plaintiffs; and that a sufficient Part of the Rents and Profits of the Testator's real Estate might be applyed for the Maintenance and Education of Plaintiffs *Edward* and *John*, the Infants, till they should respectively attain the Age of twenty-one Years.

The Cause came on to be heard before the Right Honourable the Lord Chancellor on the 7th of *June* 1769; when it was decreed that this Case should be made for the Opinion of this Honourable Court.

“ Whether, in the Event that has happened, any and
“ what Estate is vested in the Plaintiff *Eleanor* and the
“ several Defendants the Devisees, or any of them: And
“ if no Estate is vested in them or any of them, Then
“ whether any and what Estate is vested in the Plaintiffs
“ *Edward* and *John Presgrave* the two Infant Children,
“ or either of them?”

John Glynn.
J. Dunning.

This Case was twice argued in the Court of *King's Bench*; first, on *Tuesday* 20th *November* 1770, by Serjeant *Glynn* for the Plaintiffs, and Mr. *Davenport* for the Defendants; and again, on *Friday* 25th *January* 1771, by Mr. *Wallace*, for the Younger Infant Son, *John Presgrave*, and Mr. *Morton*, for the Elder Infant Son, *Edward Presgrave*, and Mr. *Dunning*, for the Nephews.

On

On Behalf of the Infant Sons, it was urged, That the Intention of the Testator could not possibly be mistaken: No one could doubt but that he meant to include all such Sons as should be born after the making of his Will. It is not possible to conceive that he meant to prefer his Nephews to his own Sons, and to leave his own Sons totally unprovided for; especially, as he had taken Care to provide for such Child or Children as his Wife should be enseint with at the Time of his Death. And as the Testator's Intention is perfectly clear and undoubted, the Court will rectify the Expression, or even *supply* proper Words, in order to effectuate it.

In Support of which Position, they cited *Cro. Car.* 185. *Spalding v. Spalding.* 3 *Lev.* 125. *Luxford v. Cheeke.* 1 *Peere Williams* 426. *Hewitt v. Ireland.* 2 *Peere Williams* 194. *Newland v. Shephard.* They also mentioned the Case of *Fonnereau v. Fonnereau*; where the Court of Chancery supplied the Words—"or should leave Issue, that should die." These Cases go further than the present Case requires: It would be enough, in the present Case, to supply—"that if the Wife should be afterwards enseint of any Child or Children."

Mr. Morton argued, that the Words "If his Wife should be enseint at the Time of his Decease," should be taken as a *Condition precedent*, rather than his Son and Heir should be disinherited. And he compared it to the Case of *Grascot and Warren*, in 12 *Mod.* 128.

On Behalf of the Nephews, It was answered That it is not enough, to say "that the Testator did not intend to exclude the Infant Plaintiffs:" It is plain that he did *not* intend to include them. He did not foresee that he should have these two after-born Children in his Life-time: And not foreseeing such an Event, he did not mean to provide for it. He had it in his Power to alter his Will, upon the Change of Circumstances: But he did not do so. The Limitation "to his Nephews" is therefore still subsisting: It never was a void One, though it may be now become a hard One. However, the Will must be taken as it stands: No Body's Wishes can alter it. The Testator has not thought fit to alter it: And it is not in the Power of the Court, to make a Will for him. If a Bachelor makes a Will, and thereby gives away his Estate; and afterwards marries; it has never been determined that such a Will shall not stand.

As to the Wife's being "enseint at the Time of the Testator's Death" being a *Condition precedent*—The Case of *Jones and Westcomb*

Westcomb shews that it was *not*. [See that Case, in *Rep. Eq.* 74. *Precedents in Chancery* 316. and the *Abridgment of Eq. Cases* 245. *pl.* 10.]

THE JUDGES of this Court certified as follows—

We are of Opinion, that the Provision made by the Testator being for Children which were to be born after the making of his Will, He certainly *intended* to comprehend *all* the Children which should be born of his then Wife, (whether *before* or *after* his Decease.) For, We think, that a Father, in making an exprefs Provision for any Children which his Wife should be *enseint with* at the Time of his *Decease*, could never intend to give his Estate to *such Children*, in *Exclusion of*, or to his *Nephews* (as the Event has happened) in *Preference to*, any Child or Children that might be *born in his Life-time*.

We are of Opinion, therefore, that (notwithstanding the *Defect of Expression* in this Will,) the Children *born before* the Testator's Death are *virtually included* in the Provision so anxiously made by a Parent for his Posthumous Children; and that, upon the true Construction of this Will, the Plaintiffs *Edward* and *John* will be entitled, (from the Testator's *manifest Intent*,) to take an Estate in *Fee* in the Premises, at their respective Ages of one and twenty; And that, in the mean time, the Plaintiff *Eleanor*, their Mother, is intitled to hold the said Premises, subject to the Trust of the said Will, for their Education and Maintenance.

MANSFIELD.
R. ASTON.
E. WILLES.
W. H. ASHHURST.

*23d April 1771.

V. Robinson v. Robinson. ante, pa. 38. Vol. 1.
and Evans, ex Dimiss. Brooke, Bart. v. Astley
Esq; and Others, (Sir William Duckenfield Da-
niel's Case,) ante, pa. 1574, 1580. Vol. 3.

Stock, one &c, *versus* Harris, Deputy-Postmaster of Friday 26th
April, 1771.
Gloucester.

THIS Case came before the Court upon a Special Verdict, and was twice argued; *viz.* First, on *Friday* 16th November 1770, by Mr. *Bearcroft* for the Plaintiff, and Mr. *Morton* for the Defendant; and now by Mr. *Dunning* for the Plaintiff, and Mr. Attorney General *Thurlow* for the Postmaster.

It was an Action brought against the Deputy-Postmaster, for *not delivering out* Letters directed to an Inhabitant of the City.

The Declaration stated that the Defendant *Gabriel Harris* was Deputy-Postmaster of that City; and that, as being so, he ought to have delivered all Letters sent by the Post and brought to him at the Post-Office of the said City, directed to any Person or Persons being Inhabitants of the said City, *to or at the Place of Abode* of such Person or Persons to whom the same Letters were respectively directed, within a reasonable time after such Letters were so brought to the said *Gabriel* at the said Post-Office at the City of *Gloucester* aforesaid. Then it states, that on such a Day a certain Letter directed to him the said *John Skinner Stock* (the Plaintiff) at the said City of *Gloucester* was sent by the Post for him the said *John Skinner Stock*, and then and there brought to the said *Gabriel* at the Post-Office of the City of *Gloucester* aforesaid, and received by him the said *Gabriel* there. Nevertheless, the said *Gabriel*, well knowing the Premises, but not regarding his Duty in that Behalf, *did not deliver* the said Letter *to or at the Place of Abode* of the said *John Skinner Stock* within a reasonable Time after the said Letter was so brought to and received by him the said *Gabriel* as aforesaid; but, on the contrary, wrongfully and injuriously kept and detained the same Letter from the said *John Skinner Stock*, for a long Space of Time over and above a reasonable Time in that Behalf, to wit, for the Space of three Days.

The Special Verdict was as follows. The Jurors find, that the Defendant, during the Time in the Declaration in that behalf mentioned, was and is Deputy-Postmaster of the City of *Gloucester*, under the Appointment of the Postmaster General. That the Plaintiff, during that Time, was and is an Inhabitant of the said City of *Gloucester*; and he and his Place of Abode well known

to the Defendant. That the Defendant, being Deputy-Postmaster as aforesaid, did publish a Notice in the said City, in the Words following, to wit, "Post-Office, *Gloucester*, May 20th 1769. Having consulted his Majesty's Postmaster General, upon the present Method of carrying out and delivering Letters at the Place of Abode of the Individuals to whom they are directed, I am informed by their Lordships, that I am NOT *obliged* so to do; and that no Allowance will be made Me from the General Post-Office for my Expences on that Account. Notice is therefore hereby given to the Inhabitants of this City, that after the 3d Day of *June* next, If it is agreeable to them to have their Letters delivered at their own Houses, they must *pay* a Compensation to the Letter Carrier, of a Half-penny a Letter, or a small quarterly Allowance, as they think proper; or else *send* for them to the Office, where they will be delivered for the Postage only. *G. Harris*, Postmaster." That *until* the Publication of this Notice, Letters directed to the Inhabitants of *Gloucester* were *always delivered* to them *at their Places of Abode within the said City*, by the Postmaster for the Time being, without any Gratuity or Reward over and beyond the common Rate of Postage. That the Plaintiff afterwards caused Notice to be delivered to the Defendant, in the Words following—"Sir, The Inconvenience I have so long suffered, of not having my Letters delivered to me as they used to be in the Time of your late Predecessor Mr. *Nicolls*, obliges me to give you Notice that from henceforwards I do expect and insist that all Letters which shall come to your Office directed to Me be immediately sent by You and delivered to Me at the Dwelling-house of Mr. *Edmund Phillips* in the *Catharine-Wheel-Lane*, being my Place of Abode; without any Delay, or further Expence than the common and legal Rate of Postage. I am &c. *John Skinner Stock*. To *Gabriel Harris Esq*; Postmaster of *Gloucester*." That afterwards, on the 24th of *December* 1769, the Defendant received, at his Office in the City of *Gloucester*, a Letter by the Post, directed for the Plaintiff, being the same mentioned in the Declaration: Which Letter the Defendant did NOT *deliver* to, or at the *Place of Abode* of the Plaintiff; but the same remained, with his Knowledge, in his Office for the Space of two Days; at the Expiration whereof, the same was sent for, by the Plaintiff, to the Defendant's Office, and immediately delivered to him.

Referred to the Opinion of the Court, "Whether the Defendant was OBLIGED TO DELIVER the Letter to the Plaintiff *at his Place of Abode*, for the Postage only." If he was, then the Jurors find a Verdict for the Plaintiff; nominal Damage

mages a Shilling; and Costs 40s. If he was not, then they find for the Defendant.

Note, This is the Case which I hint at in Page 2153, of my 4th Volume, at the End of the Case of *Barnes v. Foley*. In the Beginning of that Case of *Barnes v. Foley* (pa. 2149,) I have said that I had not then in my Possession the exact literal State of it; but promised to insert it in future. This being a very proper Opportunity to discharge myself of that Promise, I will here insert it.

(*Barnes v. Foley*, *Easter Term 1776*. B. R.)*

* V. ante,
pa. 2149.

IT was an Action upon the Case *for Money had and received—* On *Non Assumpsit*, a Case was reserved at the Trial; which stated That the Defendant is Postmaster of *Bath*, under the Appointment of the Postmaster General. That upon the Defendant's Appointment, he published a Notice, "That Every Person who
" will either call at the Post-Office in *Orchard-Street*, or send their
" Servants for them, will receive their Letters at the legal
" Postage only—That the Letters that are delivered to all Persons
" for the future at their *own Houses* will be charged one Half-
" penny, except Those which have heretofore paid One Penny—
" That, to prevent any Mistakes, the Postmaster of *Bath* will
" think Himself obliged to the Persons that intend to fetch or
" send for their Letters after *Monday* the 20th Instant, to send
" their Names and Places of Abode in Writing to the Post-Office,
" that Care may be taken to have their Letters properly sorted
" by themselves—That as the Postmaster is determined to use
" Moderation in the Charge, Therefore any Merchant or Trades-
" man that receives many Letters may agree with the Postmaster
" by the Year for the Delivery of their Letters at their own
" Houses."

" *Bath*, January 17, 1766.

" *Thomas Foley*, Postmaster."

That before the Defendant's Appointment, the Postmaster of *Bath* never received any thing beyond the Rates of Postage specified in the several Acts of Parliament regulating the Post-Office, for the Delivery of Letters in any Part of *Bath*; But that the Letter-Carriers employed by the Postmaster had, for a
consider-

considerable Time before, received for their own Use, in some Parts of *Bath*, an additional Half-penny; in other Parts, a Penny; and in other Parts, Nothing, upon the Delivery of Letters.

That the Plaintiff is an House-keeper and Inhabitant of *Bath*, and was well known to the Defendant to be so; but did not call at or send to the Post-Office for his Letters, expecting and requiring that the same should be delivered to Him at his House, on Payment of the Rates of Postage fixed by the several Acts of Parliament, *only*.

That the Defendant, upon the Delivery of twenty-four Letters directed to the Plaintiff and brought by the Post from *London* to *Bath*, at his House there, *demand*ed and *received* of Him the Sum of 1 s. at the Rate of a Half-penny for each Letter, over and beyond the Rates of Postage before mentioned: Which is the Cause of Action.

The Question submitted to the Court was "Whether the Postmaster is obliged to deliver Letters to the several *Inhabitants* of *Bath* to whom they are directed, *at* their known Places of *Abode*, at the abovementioned Rates of Postage only; or is intitled to *demand* and *take* any thing more."

The Rule was, 'That the POSTEA be delivered to the PLAINTIFF.*'

* V. last vol.
pa. 2153.

The abovementioned Case of *Barnes v. Foley* was distinguished by the Name of the *Bath* Case.

After the second Argument of this *Gloucester* Case, the Court gave their Opinions *Seriatim*.

LORD MANSFIELD—In the *Bath* Case, the Fact was much the same as in the present Case. It was there stated, that before the Defendant's Appointment to be Postmaster, the Postmaster of *Bath* never received, for the Delivery of Letters in any Part of *Bath*, any thing beyond the Rates of Postage specified in the Acts of Parliament regulating the Post-Office. He gave Notice "that People must either come or send to the Post-Office to fetch them; or pay for having them delivered at their own Houses." And he accordingly demanded and received Money of the Plaintiff, for delivering his Letters at his own House, over and above the Rate of Postage beforementioned. The Question was, "Whether the Postmaster was obliged to *deliver* Letters directed to the Inhabitants, *at* their known Places of Abode, at the abovementioned Rates of Postage only; or was intitled to *demand*

“ *demand and take any thing more.*” The Court did not, in that Case, give any Opinion “ Whether the Postmaster was *obliged to deliver* Letters directed to the Inhabitants, at their known “ Places of Abode within that City.” It was determined upon another Point, the Postmaster’s *demanding and taking more* than the Acts of Parliament allow; which Claim the Postmaster could not support. The Court neither gave nor formed any Opinion upon the general Question. And they had Reasons for it. There was no drawing any Conclusions about delivering out Letters, or sending to fetch them, from the Expressions used in the Acts of Parliament: And they hoped it would be soon settled by Act of Parliament. No such Act of Parliament has been yet applied for; nor probably will be, till We shall have given our Opinions. And the present Action is brought, and the Case stated, in a proper Manner to bring the intended Question before the Court. Therefore I shall now give my Opinion upon it; and have no great Difficulty which Way to give it, though the Acts of Parliament are not professedly explicit about it.

There are two Clauses in them, which shew decisively “ that “ there are *Limits of Delivery.*” In the 5 G. 3. c. 25. § 7. are the express Words “ or within the Limits of the Delivery of “ Letters and Packets:” And in the 13th Section of the same Act, Mention is made of the Place “ where such Letter or “ Letters are delivered.” As there are, therefore, Limits of Delivery, How are those Limits fixed? The Answer is—They are fixed by Usage and Practice, and the Course that has been observed and followed in each particular Place.

The Postmasters are not, indeed, bound to find out Persons not sufficiently described: But *if they know* them, and they reside *within the established Limits*, the Postmasters are obliged to deliver their Letters at their Places of Abode.

If that be so, there is enough found upon this Special Verdict, in favour of the Plaintiff. It is expressly found “ that until the “ Defendant’s Publication of his Notice, Letters directed to the “ Inhabitants of Gloucester were always delivered to them at their “ Places of Abode *within the said City*, by the Postmaster, without “ any Gratuity or Reward over and beyond the Common Rate “ of Postage.” From whence it follows, that the Limits of Delivery of *this* Post-Office in Gloucester, are the CITY of Gloucester. This was the Practice for Sixty Years, and to this Time, for 100 Years: And there is no Foundation or Pretence for raising this Additional Money; nor is it justified by the Acts of Parliament.

The Inconvenience that would attend this Notice is very great to such as would not submit to this New Demand. How should People know of their Letters? And are they to come or send to the Post-Office, every Post Day, to inquire after the Chance of a Letter? This would be exceedingly inconvenient to Every Body; and would be particularly hard upon such of the Inhabitants as seldom receive any Letters by the Post at all.

It is raising a Tax, without any proper Application of it. The Public would not profit by it. On the contrary, it would immensely hurt the Public Revenue, though it would raise a great One to the Postmaster or his Deputy.

The inconvenient Consequences would be much more visible and more extensive, if this Attempt of the Country Postmasters was to be exercised in *London*; where the contrary Practice has prevailed; and having established it, they can't recede from it. They can not retract what has been always usual in *London*, nor even the Method which they have hitherto allowed in such Villages near *London* as are now become contiguous to it. Having once established it, they can't go back from it. So in *Gloucester*, there is no Reason or Pretence for their retracting the Method always taken in that City.

Therefore I think they have done wrong; and have attempted, without Authority, to raise a Tax upon the Public, without a sufficient Foundation whereupon to ground their Claim; and for their own Benefit, and not the Benefit of the Public, or of the Revenue.

Consequently, this Action is well brought; and the Postea ought to be delivered to the Plaintiff.

Mr. Justice ASTON—The Acts of Parliament relating to this Subject do not particularize any thing about fetching Letters, or delivering them out: They are not explicit on this Head. The Direction of a Letter informs the Officer of the Posthouse how to deliver it: And the Legislature meant that he should deliver it accordingly. The *Limits* of the Delivery are to be determined by the Usage of the Place. Here, the Delivery was used, for a great Number of Years, to be to the Inhabitants of the City of *Gloucester*, at their respective Places of Abode within the City. This Notice from the Postmaster is directly in the Teeth of the Acts of Parliament. There is no Foundation for this Demand: The Post-Office have no Right to make it. The Word “de-
“ liver”

“ liver” is likewise used in the Penny-post Acts : And there is no Doubt but that Penny-post Letters are to be delivered at the Habitations of the Persons to whom they are directed.

The Inconveniencies of fetching Letters may be very great. The whole Town or City may be attending at the same time, to enquire after their Letters. And the Postmaster might be out of the Way, when they do come for them: He is not obliged to attend at any fixed Hour. The established Usage has been, for the Postmaster of this City of *Gloucester* to deliver the Letters of the Inhabitants at their Places of Abode within the City: And this Usage was probably settled immediately upon making the Act which erected the Post-Office. The Postmaster is bound by these established Limits: He can not vary this established Practice, nor raise an additional Rate upon the Inhabitants.

Therefore the *POSTEA* ought to be delivered to the PLAINTIFF.

Mr. Justice WILLES—This being the *established Usage* in this Place, the Post-Office cannot alter it. They might as well do it in *London*, as in *Gloucester*: Which would be extremely inconvenient. In the former Place, they have extended the Usage to *Marybone* and other New Buildings: And they have done right. Here, they had no Right to depart from the former established Usage which had prevailed for such a great Length of Time: Nor can I see any Pretence for their attempting it.

Mr. Justice ASHHURST concurred entirely, as to this particular Case, circumstanced as stated in the Declaration, and found by this Special Verdict. Here, the Usage had been so long established in the City of *Gloucester*, that he held that the Postmaster had no Right to set it aside, and to refuse to deliver Letters in future, as he had been used to do, and had been so long done, at the Houses of the Inhabitants within that City; which he looked upon to be the *Limit of Delivery* established in *that* Place; whatever may be the Limits of Delivery, or whatever may be fit and proper to be determined as to any *other* Place. But he gave no Opinion, as to the Kingdom *in general*, or as to any *other* Case where the Circumstances may differ from those of the present Case.

THE COURT unanimously ordered the *POSTEA* to be delivered to the PLAINTIFF.

Note—There has been a subsequent Determination of the Court of Common Pleas, upon a like Question in *Ipswich*,
viz.

viz. “Whether the Defendant (*Goodchild*) as Postmaster of “*Ipswich*, was obliged to deliver the Letters to the *Inhabitants of Ipswich*, at their respective Places of Abode.” And they resolved, that the Parliament must mean “that “the Postmaster should deliver the Letters in Post- “towns.” It was in *Trinity Term 1773, 13^o G. 3. Rowning v. Goodchild*; An Action against the Deputy Postmaster of *Ipswich* for not delivering the Plaintiff's Letters at his Place of Abode in *Ipswich*, within a reasonable Time; but, on the contrary, detaining them for a long Time, *viz.* for the Space of ten Days: To the Plaintiff's Damage 100 *l.* Plea, “Not guilty.” At the Trial of the Cause at *Bury*, a Verdict was found for the Plaintiff, with 15. Damages and 40 *s.* Costs; subject to the Opinion of this Court on the following Case.

—That the Defendant, during the Time in the Declaration mentioned, was, and is Deputy Postmaster of the Town of *Ipswich*, under the Appointment of the Postmaster General: And the Plaintiff during all that Time was and is an Inhabitant of and within the said Town of *Ipswich*; and he and his Place of Abode are well known to the Defendant.

Previous to the Year 1741, the Letters which were brought by the Post from *London*, directed to the Inhabitants of *Ipswich*, were delivered to them at their respective Places of Abode, by the Deputy Postmaster of *Ipswich* for the Time being, at the legal Rate of Postage only: But the Inhabitants of *Ipswich* constantly for Time immemorial, till the said Year 1741, paid to the Letter-Carrier employed by the Deputy-Postmaster for the Time being, a Recompence of 1 *d.* a Letter, for the Delivery at their respective Places of Abode, of all Letters which were brought by the Post from all Parts of *Norfolk and Suffolk*, over and above the legal Rate of Postage, being delivered at a different Time of the Day from those which were brought by the *London Post*.

In the Year 1741, the Post from *London* to *Ipswich* was established six Days in a Week, instead of three: Upon which Occasion, Public Notice was given to the Inhabitants, by the Common Cryer, “that such of 'em as “chose to have their Letters delivered at their Places “of Abode must pay to the Letter-Carrier a Recompence of One Half-penny for each Letter, as well for “those

“ those which previous to the said Notice were delivered without Recompence, as for those for which One Penny Recompence had been paid.”

The greatest Part of the Inhabitants complied with this Notice, and have ever since voluntarily paid to the Letter-Carrier either One Half-penny over and above the legal Postage, for the Delivery of each Letter at their respective Places of Abode; or have agreed with the Letter-Carrier, and paid Her a Quarterly or Yearly Allowance for the Delivery of all their Letters; except three Persons, who gave the Letter-Carrier a Christmas-Box.

The Plaintiff, ever since the said Year 1741, paid the Recompence of One Half-penny for the Delivery of each Letter at his Place of Abode, till *April* 1772; when he refused any longer to pay the same.

The Letter-Carrier does not receive any Salary from the Defendant, for delivering the Letters; nor does she account to the Defendant for any Part of the Recompence she receives for such Delivery, but applies the same to her own Use.

On 1st *April* 1772, the Defendant received, at his Office in the Town of *Ipswich*, Ten Letters by the *London Post*, directed to the Plaintiff at *Ipswich* (being the same Letters as are mentioned in the Declaration;) which Letters the Defendant did not deliver at the Plaintiff's Place of Abode in *Ipswich*; but the same remained, with the Defendant's Knowledge, at his said Office, for the Space of Ten Days, as stated in the Declaration.

The Question for the Opinion of the Court is—“ Whether the Defendant, as Postmaster of *Ipswich*, is obliged to deliver the Letters to the *Inhabitants* of *Ipswich*, at their respective Places of Abode.”

THE COURT having taken Time to consider, Their Opinion was delivered by *Ld. Ch. Justice de Grey*.

After stating the Case, he said the Question is, Whether the Postmaster has done his Duty, by leaving Letters at his Office in *Ipswich*; or is bound to deliver them at the Places of Abode of the Inhabitants.

This is not a Question of private Contract, or of a Common Carrier ; but arises from a great public Employment for establishing Correspondence, and is productive of a great public Revenue.

The Crown very early had appointed Postmasters for forwarding Expresses, and public Service ; but not till the Time of *Jac.* 1. for carrying on Correspondence ; and that, originally, only for foreign Correspondence, as appears by the Recital in the Proclamation of 8 *Car.* 1. *Rymer's Fœdera*, Vol. 19. p. 385. Postmaster for *England* for conveying Letters to foreign Parts, and that Others had intended &c, prohibited &c.

In 1632, this Office was granted to *Thomas Witherings*, (*Rym.* 649.) who in 1635 was ordered to take on Himself the additional Burthen of a Running-Post or Two, to *Scotland* and *Ireland*, and several Great Towns in *England*; and to take the like as now paid, as near as possibly can : Which looks as if there had been something of a private Establishment before. This was enforced by Proclamation in 1635.

In 1637, an Office was erected for the Purpose of Carrying Letters, called the Letter-Office, and added to *Witherings's* Office, and put under his Care, for carrying on Correspondence in the King's Dominions. *Rym. Fœd.* Vol. 20. p. 192.

In 1640, *Witherings* having abused his Trust, the Offices were sequestered into the Hands of *Philip Burlamachy*, under the Care and Oversight of the Principal Secretary of State ; to be carried on as near as might be in the former Course. *Rym. Fœd.* Vol. 20. p. 429.

Before the Restoration, several Steps were taken and various Orders made, as in the Commons Journals in 1642, 1644, 1649 &c : And it became a General Conveyance to all Parts of *England*.

In 1654, the Office was granted by Act of Government to *Manley*, under Rent and Conditions. *Scobell's Acts and Ordinances*, p. 358. c. 51.

In

In 1656, a General Office was erected for *England, Scotland, and Ireland.* *Scob.* 511.

At the Restoration, the *Stat.* of 12 *Car.* 2. c. 35. was made, much upon the same Plan, but with new Powers and Forms: Under which Act it was carried on, till 9 *Ann.* c. 10. in which there are some additional Regulations; And it was made a National Establishment for the Purpose of Correspondence, and also a great National Revenue.

The Question depends upon the Construction of this *Stat.* of 9 *Ann.* And the only Consideration is, What is meant by the Word "*Delivery*:"—Whether in the Town, or at the Office.

By § 2. it appears that the Duty of the Postmaster consists in three Articles, *viz.* *Receiving, Carrying, and DELIVERING* Letters. He is authorized to appoint Stages as He thinks convenient. *London* is the Centre of the Whole: Other Towns are Inferior Centres; Places of Receipt and Delivery. So, as *London* is the *Terminus à quo*, Each Inferior is the Centre where to be received and delivered.

In the Old Proclamation of 1635, the Postmaster is to *carry* the Letters, which Letters shall be left at the Post-house, or some other House which He shall appoint: But that Word has been dropt in all subsequent Proceedings; and instead thereof, the Word "*Delivered*" has been substituted.

So that he is not only to carry, but to do something more—*Deliver*—"deliver as directed," that is, *to another Person.*

But quitting the Possession of the Thing does not answer the Idea conveyed in the Word "*Delivery*:" And a Detention in his Custody is contradictory to it—He not only doth not deliver; but doth not quit the Possession.

He ought to deliver them from the Custody He had of them. This, on comparing all the Clauses in 9 *Ann.* is the Sense in which the Parliament meant the Word *Deliver*: For, to suppose that when the Letters are brought to the Town, All the Inhabitants are to send every Post to inquire &c, would be impossible: Instead of facilitating, it would obstruct Correspondence.

The

The only Way to obviate it, would be to join in employing a Person to bring them. But that is forbidden by § 17. "not to employ a Foot-post &c."

The Case of *Barnes v. Foley* rules That the Postmaster can not demand any thing for the Delivery.

Also in § 39. the Postage is considered for carrying and delivering. And in another Place there is an Authority to appoint a Person to carry out of Post Towns above Six Miles from *London*.

The Consequence of the Whole is, That the Parliament must mean that the Postmaster must undertake to deliver the Letters in *Post Towns*.

By § 40, the Letters are not to be detained &c: And if the Party can not be found, they are to be returned for Want of due Direction. How can He know whether it be truly directed, if the Party is to send for it? And the Postmaster being to return Letters, if the Party can't be found, he must inquire; or He can not say "He can not be found:" Therefore He must look for Him.

By § 30—"If the Person to whom a Letter is delivered refuses "to pay the Postage"—This must mean a personal Delivery at his House where directed: Or it would have said—"If Taking &c out of the Office, He refused to pay."

Then § 15. Foreign Letters delivered in the Post-Office of the Port to be forwarded to the General Office, to be delivered according to the Directions—The same must be applied to Inland Letters; Or there will be different Rules for the same Thing.

* V. Sect. 7.
and compare
it with 9 Ann.
c. 10. Sect.
2. 15. 16.

The Act of 5 G. 3. c. 25* (relating to Letters brought by Ships) provides that the Postmaster is to take 1d. over and above what he may now receive for the same, if the Place of Directions is within the Town belonging to the Port or Limits of Delivery.

Here where there is no Postage, a new Price is given; and also it is implied that there may be other Limits than the Office. And the *Post-Town* is looked on as the Place of Delivery

Delivery: And therefore upon this Ground, the Court of Kings Bench, in the Gloucester Case, held They were to be delivered at a particular Precinct, as being within the usual Limits of Delivery.

The Provision for Penny-post Letters in 4 G. 2. c. 33. uses the Word "*Delivery*" in the same manner: And it is agreed on all hands that *those* are to be delivered.

I speak now of Post-Towns, and the Limits of Delivery in and about those Towns.

The Officers have always acted agreeably. In *London*, there is no Provision different from others. And it has gradually taken Place in other Great Commercial Towns; *Bristol, &c.*

Whenever the Post-Master appoints other Post-Towns, They are inferior Centres of Circles within which Letters ought to be delivered.

But it was objected 1st. That this Action doth not lie; that it ought to be brought against the Principal, not the Deputy: 2dly, If the Deputy is liable, yet the Action ought to be only for the Penalty; not a General Action.

But a Deputy Officer is answerable for his own Mifseafance. 1 *Ld. Raym.* 655. Besides, this Office, in its Nature, could not possibly be carried on without many Officers. Yet though in some Respects Deputies, the Statute considers them to many Purposes Officers. And therefore, *à fortiori*, They shall be liable for their own Mifseafance.

We are therefore All of Opinion, 1st, that An Action will lie against the Deputies; And 2dly, that it will lie notwithstanding the Penalty; For, a Man may suffer greatly more than the Penalty. So that 20*l.* may be no adequate Satisfaction: but however, not to take away the Statute Remedy for Mifseafance—In the Case of *Stock v. Harris*, in *B. R.* which was the same Action, this Objection was never taken: And Judgment was there given for the Plaintiff.

WE are ALL of OPINION that

The POSTEA must be delivered to the PLAINTIFF.

Tuesday,
30th April
1771.

Henry Law, who &c, *versus* James Ibbetson, D. D.

IN Debt upon the Statute of 21 H. 8. for Non-Residence,
The Defendant pleaded the General Issue.

Upon Trial, at the last Assizes for the County of *Hertford*, a Verdict was given for the Plaintiff for 10*l*. Subject to the Opinion of the Court upon this Case; *viz.*

The Defendant, beneficed with the Rectory of the Parish-Church of *Bushey* to which there is a good *Parsonage-house* belonging, during all the Time mentioned in the Declaration performed the Duty of Rector of the said Parish, but was personally resident and abiding in and upon a *Dwelling-house* belonging to Himself, in *Bushey* in the Parish of *Bushey*; and not in and upon the said *Parsonage-house* belonging to the said Rectory.

The Defendant also, during all the Time aforesaid, was, and still is ARCHDEACON in and throughout the whole Archdeaconry of *St. Alban's* and the Limits thereof: Which is an Ecclesiastical Dignity, with Jurisdiction of granting Licences for Marriages, Probate of Wills, and Letters of Administration. He has a Seat in the Church of *St. Alban's*; has a *Deputy-Register* who lives at *St. Alban's* and keeps an Office there: But the Seal of Office is kept by the Defendant in his own Custody; to whom the said Deputy-Register applies for the Use of the Seal and the Dispatch of Business.

The House in which the Defendant was and is resident and abiding, is within the Limits of the said Archdeaconry (as is also his Rectory-House,) but is not belonging, nor is there any House which does belong to his Archdeaconry as an Archidiaconal House.

The Question for the Opinion of the Court is, “Whether, “under these Circumstances, the Plaintiff is intitled to recover.”

Mr. *Kempe* argued this Case, on behalf of the Plaintiff; and Mr. *Lucas*, for the Defendant.

Mr. *Kempe* said, the Action was brought for Non-Residence on the Parsonage: And the single Question is, “Whether the “Doctor has kept a personal Residence and Abode at in and
“upon

“ upon either his Dignity or his Parsonage.” There being no House belonging to his Archdeaconry is no Excuse for his not residing in the Parsonage-house belonging to his Benefice. He must be personally resident upon One or the other. An Archdeaconry is One of the Dignities expressly mentioned in the Act of 21 H. 8. c. 13. That Act was not introductory of a new Duty. Residence was requisite, before this Act of Parliament, both by Common Law and in Common Sense. To prove which, he cited 2 Inst. 625, 626. and the Register 58.^b Non-Residence was a perpetual Complaint, from the Time of H. 3^d. to that of H. 8th. In the Case of *Butler v. Goodale*, P. 40. Eliz. in B. R. 6 Rep. 21.^b upon an Information on this Statute, it was resolved by the Court, “ that the Parson ought to “ abide upon his Rectory; *scilicet*, upon his *Parsonage-house*, “ and not in any *other* House, *although* it be within the same “ Parish.” He said, a Suffragan would have been bound, before 25 H. 8. c. 19. § 7. to reside upon his Parsonage or Vicarage: And so is a Bishop holding in Commendam. Complete Incumbent, cap. 37. Hob. 16. says “ that an Archdeacon derives his “ Power from the Bishop.”

Mr. Lucas answered, that if the Doctor had not complied with the Canons, he was open to the Canon-Law. It was enough if he resided *either* upon his Dignity *or* his Benefice. And he did reside within the Limits of his Archdeaconry: which is sufficient, as there was no House belonging to it. He endeavoured to explain the Case of *Butler & Goodale*, as not the unanimous Opinion of the whole Court; * and cited *Cannige v. Dr. Newman*, 2 Brownlow 54. He argued that an Archdeaconry is a Dignity within this Act of Parliament; and cited the Case of *Broughton v. Gousley*, Cro. Eliz. 663. concerning Dignities in the Church.

* V. Moore
540. Cro.
Eliz. 590,
591.

LORD MANSFIELD—The Words of the Act of Parliament are very pointed and very precise. They are † “ that as well † 21 H. 8.
“ every Spiritual Person now being promoted to any Arch- c. 13. f. 26.
“ deaconry Deanry or Dignity in any Monastery or Cathedral
“ Church or other Church Conventual or Collegiate, or be-
“ ing beneficed with any Parsonage or Vicarage, as all and every
“ Spiritual Person and Persons which hereafter shall be promot-
“ ed to any of the said Dignities or Benefices with any Parson-
“ age or Vicarage, from the Feast of St. Michael the Arch-
“ angel next coming shall be personally resident and abiding
“ in at and upon his said Dignity Prebend or Benefice, or at
“ One of them at the least. And in case that any such Spiri-
“ tual Person, at any Time after the said Feast, keep not Re-
“ sidence

“ fidence *at One* of his faid Dignities Prebends or Benefices
 “ as is aforefaid, but abfent himfelf wilfully by the Space
 “ of One Month together, or by the Space of two Months
 “ to be accompted at feveral Times, in any one Year; and
 “ make his Refidence and Abiding in any other Places by
 “ fuch Time; that then he fhall forfeit, &c.”

The Determinations, upon adjudged Cafes, are “ that if he
 “ does not refide upon One or the other, he is within the
 “ Penalty;” and “ that if there be a Houfe upon the Parfon-
 “ age or Dignity he muft refide *in that Houfe*,” it not being
 fufficient to refide in any *other* Houfe, though it be within
 the fame Parifh.

If there be no Houfe, then indeed he may refide where he
 will; provided it be within the Parifh: For, he can’t, upon
 a penal Act, be punifhed for not refiding in the Houfe, when
 there is no Houfe for him to refide in.

Refidence is a *technical* Term: He muft fhew, that he was refi-
 dent, within the technical Senfe, under the Act of Parliament.

His Lordfhip was of Opinion that the Plaintiff fhould have
 Judgment.

Mr. Juftice ASTON was of the fame Opinion. He like-
 wife confidered Refidence as a *technical* Term: And it muft be
in the Houfe, if there be One. The Doctor is here charged
 with having abfented himfelf from his Rectory and from his
 Dignity, and refided elfewhere. This was inferted in the De-
 claration, in order to fhew that he was not fo refident as the
 enacting Part of the Statute requires. The not having it in
 his power to keep Refidence upon his Archdeaconry, becaufe
 there was *no Houfe*, can’t excufe him for not refiding upon
 his Parfonage, where there *was a Houfe*. This Excufe goes
 no further than to the not refiding where there was no Houfe
 to refide in. And I think, this Cafe ought to be confidered
 in the fame manner as if the Archdeaconry and the Parfonage
 had been an hundred Miles diftant from each other.

Mr. Juftice WILLES and Mr. Juftice ASHHURST were
 of the fame Opinion, that it was neceffary for the Defendant
 to have refided in the Parfonage-Houfe, as there was One;
 that the Refiding in another Houfe, though within the Parifh,
 was not fufficient; and that there being no Houfe belonging
 to

to the Archdeaconry was no Excuse for his not residing upon his Parsonage, where there was a Parsonage-house, in which he might have resided.

THE WHOLE COURT concurred in Opinion

for the PLAINTIFF.

Note—There was afterwards a Case in this Court, on Friday 3d May 1776, *Wilkinson Esq; who &c, v. Allot, Clerk*; where there was no Parsonage-house, and therefore the Parson absented himself entirely, and did not reside in the Parish at all: And the Court held, that though Impossibilities will indeed excuse, yet he must come *as near as he can* to residing in the Parsonage-house; He must reside *somewhere within* the Parish.

Martin v. Townshend and Sawbridge.

Wednesday,
1st of May
1771.

BY 10 G. 3. c. 50. "for the further preventing Delays of Justice by reason of Privilege of Parliament," it is recited "that the Process by *Distringas* is dilatory and expensive." For Remedy whereof, it * enacts "that the Court out of which * V. Sect. 3. "the Writ proceeds may order the issues levied from Time to Time to be *Sold*, and the Money arising thereby to be applied "to pay such Costs to the Plaintiff, as the said Court shall think "just, under all the Circumstances, to order; and the Surplus "to be retained until the Defendant shall have appeared, or "other Purpose of the Writ be answered." With a Proviso † that "when the Purpose of the Writ is answered, then † Sect. 4. "the said Issues shall be *returned*; or if sold, what shall remain of the Money arising by such Sale shall be repaid to "the Party distrained upon."

The Plaintiff in the present Action (which was against a Member of Parliament) had proceeded agreeably to this Act of Parliament, and had obtained Rules for selling the Issues levied upon a *Distringas*, an *Alias distringas*, and a *Pluries distringas*; and also a Rule for an Attachment against the Sheriffs: But no issues had been actually levied. However, the Defendant did, at Length, appear.

Mr *Thomas Cowper* thereupon moved, that these Rules should be all discharged. For, as no Issues had been levied, they could not be sold; and, as the Defendant in the Action had

now appeared, the End and Purpose of these Writs were answered; the Intention of them being Nothing more than to enforce an Appearance.

Mr. *Morgan, contra*, on behalf of the Plaintiff, insisted upon the *Costs* of issuing these Writs, before the Rules should be discharged.

THE COURT thought that to be just and reasonable; and directed that *on Payment* of such Costs, the Rules should be discharged. They were of Opinion that these Costs were not to attend the Event of the Suit; but were to be paid to the Plaintiff immediately and at all Events, whether he should finally succeed in the Suit, or not.

Raban *versus* Plaistow.

Thursday,
2d of May
1771.

THE next Day, Another Question arose upon the same Act of Parliament: But it was a Question of a different Kind, and in a different Cause.

This latter Case had no Relation to Privilege of Parliament. It was the Case of a Sheriff who did not bring in the Body, after a Return of a "*Cepi Corpus*" made by his Predecessor: For which Neglect or Refusal, several Writs of *Distringas* had issued against this succeeding Sheriff. For, the Practice is, that if a Sheriff in Office returns a *Cepi Corpus*, and will not bring in the Body though he remains in Office, an *Attachment* shall go against him: But if he is gone out of Office, an *Attachment* shall not issue against his *Successor*, the new Sheriff, who did not make the Return of *Cepi Corpus*; but a *Distringas* is the Method of enforcing him to bring in the Body. And this latter was the present Case; *viz.* that these Writs of *Distringas* had issued against the Succeeding Sheriff, for not bringing in the Body upon a *Cepi Corpus* returned by a former Sheriff since gone out of Office. And the Court was applied to, on behalf of the Plaintiff, that they would direct the Issues to be fold; and that the Plaintiff should be paid his Costs, out of the Money arising thereby.

Mr. *Bearcroft* was Counsel for the Sheriff against whom these Writs of *Distringas* had issued: And he endeavoured to shew that this Act of Parliament of 10 G 3. c. 50. does not extend to Writs of *Distringas* in general; but only to such Writs of *Distringas* as are issued against Members of Parliament, or relate to Privilege of Parliament. He argued from

from the Title and the Preamble of this Act. The former is "for the further preventing Delays of Justice, by reason of Privilege of Parliament:" The latter is also, in express Terms, confined to the Inconveniences arising from the Delay of "Suits by reason of Privilege of Parliament."

But LORD MANSFIELD held that this Act of Parliament relates to *all* Writs of *Distringas*, in General; and is not confined to such as concern Privilege of Parliament only.*

* Note—The third Clause begins thus—"And where-
" as the Process by *Distringas* is dilatory and ex-
" pensive; for Remedy thereof, be it enacted."

THE COURT ordered the Issues to be sold; and the Costs hitherto incurred by the Fault of the Sheriff to be taxed, and paid to the Plaintiff out of the Money arising thereby; and the Residue to be retained, in order to answer the Event of the Suit.

French *versus* Backhouse;

French *versus* Foulston.

Saturday,
11th of May
1771.

THESE were two distinct Actions, of Covenant brought against two Part-owners of a Ship, by the Husband of it, who had been appointed to that Office, by a Deed executed by all the Joint-Owners: By which Deed they impowered him generally to do and Act as Husband of the Ship, as is customary; and to advance or lend &c; and, for all Payments made on account of the Ship, to retain, &c.

He insured the Ship; and now brought these Actions, for the Money paid by him for insuring it: It was not a Demand of their respective Proportions; but a Demand from Each, of the Whole Sum paid. Both Causes stood together for Trial: That against * *Backhouse* came on first. It was then agreed, (and so the Court now clearly held,) that the Husband had no Right to insure for any Part-Owner, without his particular Direction; nor for all the Owners in general, without their general Direction, or something equivalent to it. In the present Case, it was not pretended that he had received any *express* general Direction from all the Owners: But it was insisted, on the Part of the Plaintiff, that they were *informed* of it, and *acquiesced* in it. And the Plaintiff's Counsel called a Witness to prove this. The Defendant's Counsel denied it; and insisted that they were never informed of it before the bringing

* Qu. See
the marginal
Note next
Page.

ing of the Action. And this they offered to prove, by calling Mr. *Foulston*, the Defendant in the second Cause. The Plaintiff's Counsel objected to his *Competency*. The Defendant's Counsel answered and insisted, that there was no Objection to his *Competency*; whatever there might be to the Degree of Credit to be given to his Testimony. Lord *Mansfield* held him an *incompetent* Witness, and rejected his Testimony upon that Foot. A Verdict was given for the Plaintiff. And Mr. *Dunning* now moved, on behalf of the Defendant, for a New Trial.

* I am not sure, which of the two Causes came on first. So that I may, perhaps, have reversed the Names of the two Defendants. However, that is a Circumstance of no Importance to the Determination.

Mr. *Dunning*, as Counsel for Mr. **Backhouse*, the Defendant in the Action that came on first, argued that Mr. **Foulston*, the Defendant in the second Action (which stood next for Trial) was a *Competent* Witness: If there was any Objection to him, it could go no further than to his Credibility. He has no Interest in *this* Cause of *French* against *Backhouse*. Each of the two Defendants are separately and individually charged. Each of the two Causes must stand upon its own Evidence. One of these two Defendants would not be liable to Contribution to the other, upon a Recovery against that Other. One only of the Part-Owners had given the Plaintiff Directions to insure. But such a Direction given by One Part-Owner only would not bind the Rest. The Plaintiff was appointed by the Articles, to be Husband of the Ship. The Plaintiff's Counsel called a Witness (*French's* Clerk,) to prove "that *French* told them that he had insured; and that they "did not object to it." I denied the Fact; and insisted that the other Part-Owners were never informed of it, till the bringing of the Action. And I had a Right to prove it by *this* Witness, though he was Defendant in the next Cause: For, he had no Interest in *this* former Cause; nor could the other Cause be affected by it.

Mr. *Wallace*, *contra*, for the Plaintiff—The Deed gives the Plaintiff a general Power to act as Husband of the Ship. All the Owners are Parties: All join in appointing him. They covenant to pay him all that he shall lay out on their Account. *Backhouse* and *Foulston* were both of them Owners. The Insurance was made with their Privity. That Privity was left to the Jury, as an Evidence of antecedent Direction given by the Owners; in which they All joined: which is proved by their subsequent Acquiescence. The Evidence of *French's* Clerk affected *Backhouse* and *Foulston* Both: Therefore *Foulston* could not be Evidence for *Backhouse*. The Covenant was joint and several. The Action for the whole Money paid for insuring is brought against Each severally; And the Recovery must be

of the *Whole*, in Both Actions: And *Foulston* would be liable to *Backhouse* for Contribution, in the former Action. Therefore he is interested.

Mr. *Dunning* replied—That this is not an Act which a Ship's Husband can customarily do, unauthorized. It is not an Act that he can do, by the Direction of *only One* Part-Owner, without Authority from the Rest. The Plaintiff called a Witness to prove that a Direction was given by one Part-Owner; and also called the Plaintiff's Clerk, to prove "that Both" were acquainted with it, and *Both acquiesced* in it." To contradict the Plaintiff's Clerk, I called this Witness, who was Defendant in the next Cause. This is not like the Case of two Partners. *Backhouse* can't recover against *Foulston*, for Contribution of his Proportion on this Verdict. He was not liable to Contribution: He had no Interest in the *Action*. His having an Interest in the *Question* can only be an Objection to his *Credit*: 'Tis none to his *Competency*. The Jury ought to have heard him. The Plaintiff could not have maintained this Action, without bringing it home to *all* the Owners: He could take his Remedy against such of them only, as had authorized him to do the Act.

THE COURT discharged the Rule for a New Trial; being clearly of Opinion, "that the Witness was *Incompetent*."

It was agreed, on all hands, "That a Direction to insure, given by *One* Part-Owner only, would *not* bind the *Rest* of the Part-Owners."

LORD MANSFIELD—It is most usual, for All the Owners to direct the Husband of the Ship "to act discretionally for them All." But this is *not his Office* to do, without particular Directions.

Here, a general Direction came within the Terms of the Deed: And the Husband did insure for all the Owners. There is a strong Probability "that he had a General Direction." Indeed, the Evidence brought to prove "that there was a general Direction given by *all* the Owners," was not, "that they gave an *Express* Direction:" It only proved "that they were *told* of the Insurance, and expressed *no Objection* to it." Unless there was a general Direction, the Plaintiff could not recover in this Action. This is an Action for the *whole* of the Insurance-Money. The other Part-Owners can't be liable to Contribution in this Action, unless there was a Di-

rection "to insure" given by them all. This Case comes within the Reason of that of an Action brought against One Partner who can come against his Co-partner for a Contribution.

Mr. Justice ASTON concurred, that the Verdict against One of these Joint-Owners would affect the other of them; because that Other would be obliged to contribute.

Mr. Justice WILLES was likewise clear in Opinion, that, as the Point to be left to the Jury, was "Whether the Other Joint-Owners being informed of the Insurance and Acquiescing in it was sufficient Evidence of their directing it," this other Joint-Owner could not be called as a Witness to disprove it; because his giving such Evidence would tend to discharge Himself.

Mr. Justice ASHHURST also held, that the Plaintiff (notwithstanding the general Power given him by the Deed "to act as Husband of the Ship") had no Authority to *Insure* it; without either a general *Direction* from *All* the Part-Owners, or a particular *Direction* from *Each*. Here, he goes upon a general *Direction* from *All*: And he would prove this by shewing "that they All knew of his having insured, and acquiesced in it." The Other Joint-Owner, the Defendant in the second Action, is called to disprove this. But it is to be observed, that these Actions are brought, not against each Defendant for his *Proportion* of the Insurance-money; but against Each, for the *Whole* of it: In which Case, it is an Objection; and is like the Case of an Action brought against *One* Partner for the whole Debt due from the Copartnership. There is no Foundation, therefore, for granting a New Trial.

Per Cur' unanimously,

Let the Rule for a New Trial be DISCHARGED.

V. post. pa. a Case of *Bennetto v. Henry Evans*, in
Easter Term 1773, 13 G. 3. B. R. Monday 3d May
1773: in which, this Case was mentioned and affirmed.

Monday,
13th of May,
1771.

Short *versus* John Coffin, Executor of Benjamin Coffin.

THE COURT, after taking two or three Days to consider of it, were All clearly of Opinion to amend a Judgment against an Executor, *de Bonis propriis*, by making it *de Bonis*

nis Testatoris, si &c; et de Bonis propriis, si non &c. It was after a Writ of Error had been brought; "*in nullo est erratum*" pleaded; and an Argument in the Exchequer Chamber.

Mr. *Davenport* had moved for this Amendment, upon the Foot of its being only a Mistake of the Clerk; and had cited 2 *Lev.* 22. *Chapman v. Gale.* *Foster v. Blackwell.* 1 *Barnes* 11. *Blakey v. Birmingham.* 2 *Stra.* 1132. *Slicer v. Thompson,* 2 *Stra.* 1156. *Hillersdon v. Skildroy.* 2 *Stra.* 1182. *Halley v. Wenman.* H. 8. G. 3. B. R. and *Boothby v. Richardson,* in 2 G. 3. B. R.

Mr. *Wallace*, who opposed the Amendment, denied it to be a Mistake of the Clerk. He said, it was a Mistake in Law: And this Amendment would alter the Essential Judgment. He cited 1 *Ro. Abr.* Title "Amendment," pa. 205. Letter *F.* and *Villars v. Parry and Moor,* 1 *Ld. Raym.* 182. where the Court agreed with Serjeant *Levinz*, "that if Debt be brought against an Executor, and Judgment given against him *de Bonis propriis*, this is not amendable."

BUT LORD MANSFIELD delivered it as the Opinion of the Court, "That this is not an Error in the Judgment of the Court in Point of Law; but a mere Mistake of the Clerk:" and he repeated at large the Case of *Chapman v. Gale*, from 2 *Lev.* 22. Which was Debt against an Executor, who pleaded "*plene administravit*;" and Verdict and Judgment for the Plaintiff; Which was entred generally: And thereupon Error was brought; and it was assigned "that the Judgment should have been *de Bonis Testatoris, si, &c.*" But upon the Affidavit of *Astry* the Attorney, "that he gave his Clerk Instructions to enter it up according to the Plea, and that 'twas a mere Mistake of the Clerk," it was amended, as a Misprision of the Clerk. It is true, that the same Case is reported in 2 *Keble* 810. who says, "It was ordered to be amended, by Consent." But *Levinz* is a much better Reporter than *Keble*. And his Lordship mentioned the Case of *Chester v. Lees*, in *Cartbew.* 167, where it is said "that *Holt* Ch. J. remembred a Case between *Chapman* and *Gale*, where the Judgment against an Executor was general; and upon a Motion, the Words following were added—*De Bonis Testatoris levand.*"

The End of Easter Term 1771, 11 G. 3.

Trinity Term

11 Geo. 3. B. R. 1771.

Saturday,
1st of June
1771.

Hamilton and Smyth *versus* Davis.

A Motion had been made, last Term, for a New Trial. The Cause had been tried before *John Morton* Esq; Chief Justice of *Chester*, and *Taylor White* Esq; the other Judge of that Circuit.

The Report of the Case and Evidence was as follows—(It came from Mr. *Morton*.)

Robert Hamilton and *Thomas Smyth* against *John Davis*—In Trover—The Plaintiffs declare, That on the 20th *December* 1770, they were possessed of three Hogsheds of Tallow, value 100*l*. That the Goods came into the Possession of the Defendant: which he converted to his own Use—To the Plaintiff's Damage 100*l*.

Defendant pleaded “Not Guilty.”

The Plaintiffs claimed the Goods in Question, as Consignees thereof by *Dennis Moylan* of *Cork*: And to prove their Case, they called *William Jackson*, Captain of an *Irish* trading Vessel; who knew the Vessel, called the *Hill House*, and Captain *Penny* the Master of her in her last Voyage in *November* 1770.

Is then shewn the following Bill of Lading; and proves the Name *William Penny* subscribed thereto, to be the Hand writing of the said Captain *Penny*.

The Bill of Lading read; and is as follows: viz.

Cork,

Cork, November 27th, 1770.

Shipped by *Dennis Moylan* on the Ship *Hill House*, Master *William Penny*, and now lying in *Cork*, bound for *Liverpoole*, 20 Hogsheds of Tallow, for Account and Risque as *per Invoice* marked D.M. N^o 1. A. 20. of Tallow—Branded on the Head, D. Moylan.

To be delivered &c, at the Port of *Liverpoole*, to Messrs. *Hamilton and Smith*.

William Penny.

Weight unknown.

That the *Hill House* sailed from *Cork*, in *November* or *December* last, and has never since been heard of; and, as he believes, foundered and was totally lost.

John Stokes was next called; who said the Plaintiffs were Partners in *Liverpool* on the 9th of *December* last.

That he was sent by the Plaintiffs, to enquire after the Ship and Goods.*

That he made Inquiry, for some Days, in *Cheeshire*; and then returned to the Plaintiffs, and gave them Account of divers of the Goods being on Shore, in the Possession of different Persons.

Returned with their Orders to demand the Goods, and a proper Salvage.

That all but *Davis*, the Defendant, delivered up the Goods on Demand, on a Salvage paid them.

That he saw in *Davis's* Possession the three Hogsheds of Tallow, branded and marked as in the Bill of Lading: Which *Davis* refused to agree to deliver, on the Terms the others had done.

That on the 19th Day of *December* he saw *Davis* at *Heylach*, in Company with others who had got, in all, Ten Hogsheds of Tallow in their Possession.

That he then made a Demand of all; and tendered them five Guineas for their Trouble and Salvage.

Davis refused to deliver his Part; which was the three Hogsheads belonging to the Plaintiffs.

On the next day, a second Demand was made on *Davis*; and, if he refused the former Offer, the Witness offered to leave the Salvage to be settled by any three Justices of the Peace of his own naming.

But *Davis* absolutely refused to deliver them, unless he was compelled to do it.

That, in pursuance of the Order so received from Mr. *Smith* one of the Plaintiffs, he did obtain several other Hogsheads of the same Mark, for the same Salvage, as he had offered *Davis*; and carried them with him to *Liverpoole*, for the Plaintiffs.

He said, *J. Blundell* was with him at the Time of the above Transaction.

And *Blundell*, being called, confirmed *Stokes's* Evidence in all Particulars; and also proved the Value of the Tallow to be 30 *l.* per Hogshead on an Average.

The Plaintiff rested his Case on this Evidence. The Defendant called no Witness; But objected to the Plaintiff's Right to recover on the Case he had thus made; insisting by his Counsel,

First, That, it appearing the Ship had been totally lost, and that no living Creature had come alive from the Ship to the Shore, the Ship and the Goods therein were a *Wreck*; and thereby became the Property of the Crown or its Grantee (under whom *Davis* the Defendant acted,) by and under the Provisions of the Statute of the 3 *Edw. 1. cap. 4th.*

Secondly, That, supposing the Plaintiff not to have lost his Property by the Ship being a *Wreck*, yet, under all the Circumstances of this Case, the Plaintiffs ought not to recover in this Action, as they had not shewed that they had complied with the *Requisites* either of the Statute 27 *Ed. 3. Cap. 13.* or of the 12th *Ann. cap. 18.*

But Mr. Justice WHITE and I were of Opinion, under the Circumstances of this Case, that the Plaintiffs were intitled to recover in this Action, if the Jury were satisfied, with the Proof made

made of their Property in the Goods; and that they had tendered a reasonable Sum for the Expence of Salvage; And that, under the Circumstances of this Case, none of the Provisions of the Statutes, either of the 27th Edw. 3d. or the 12th Ann. were any Bar to the Plaintiff's having a Verdict, on the Evidence he had laid before the Jury.

The Jury were satisfied with the Proof of the Plaintiff's Property; and that he had tendered a reasonable Salvage; and found a Verdict for the Plaintiff, with Damages for 79*l.* 8*s.* 6*d.*

We allowed the Defendant Leave to move for a New Trial, without Costs, in case we were mistaken in our Opinion with respect to the Objections made by the Defendant's Counsel to the Plaintiff's Right to recover.

Mr. *Wallace* and Mr. *Davenport* shewed Cause, on behalf of the Plaintiffs, why there ought not to be a new Trial. They said, it was tried by a Special Jury of the County of *Denbigh*. The Defendant was Tenant to Mr. *Egerton*, Lord of the Manor: And the only Question was "Whether this was * *Wreck* belonging to Mr. *Egerton*." As *Wreck* belongs to the * King, if not granted away, the Defendant was put to make out his Property. But the only Fact to be tried, was "Whether the Tender of Salvage was sufficient." The Marks upon the Goods corresponded with the Bill of Lading and Consignment: So that the Owner of them was fully known. And the Jury were satisfied with Proof of the Property of the Owners in these Goods; and that a reasonable Salvage had been tendered. However, it does not lie in the Mouth of the Defendant, to object either to the Nature or to the Reasonableness of the Salvage; because he claims the Property of the Goods as a *Wreck*. And, for that Reason, the Statute of 12 Ann. c. 18. does not apply to this Case. † But they denied that the Property of these Goods was devested out of the Owner: And they cited 2 Inst. 166. 167. on the Statute of Westm. 1. 3. E. 1. c. 4. and the fourth Resolution in Sir *Henry Constable's Case*, 5 Co. Rep. 107. ^b in both which Places, *Bracton* ‡ (who wrote before this Statute of Westm. 1.) is § Lib. 3. cited to prove "that it was but a Declaration of the Common Law;" against the Opinion of Doctor and Student, Lib. 2. c. 51. pa. 156. *Bracton's* Words are "*si certa Signa apposita fuere Mercitus*." Here, the Marks were apparent upon the Goods. And as to the 27 E. 3. Stat. 2. c. 13. there are no Requisites in it, which the Plaintiffs have failed to comply with.

* V. Blackstone's Commentaries. Lib. 1. c. 8. § 11. pa. 280.

† See 12 Ann. Stat. 2 c. 18. sect. 2, 4, 9.

‡ Lib. 3. fo. 120.

Mr. Dunning, Mr. Kenyon, Mr. Atherton, and Mr. Owen argued on behalf of the Defendant, for a New Trial.

As to the first Point—They asserted that this was a *Wreck*, according to all our Writers, down from the *Mirroure* to Mr. Justice Blackstone; as *no living Creature* had come to Shore. The Criterion of a Wreck is the Escape of a Man or any other Animal, *alive*: All the Writers make *this* the Distinction between its being a Wreck, or not. *Horne*, in his *Mirroure of Justices*, c. 1. § 13. says that Coroners, at their Views of Wrecks, ought to enquire “if a Man, a Beast, Cat, or other living Thing came to Shore with the Wreck, or not.” *Henry 1st.* ordained, that if any Person escaped alive out of the Ship, it should be no Wreck. *Henry 2d.* by his Charter, declared that if any Man or Beast should escape or be found alive in the Ship, the Goods should remain to the Owners, if they claimed them within three Months; but otherwise should be esteemed a Wreck. The Statute of *Westm. 1.* (3 E. 1. c. 4.) is agreeable to the Charter of *H. 2.* and enacts that if a Man, a Dog, or a Cat escape alive, it shall not be adjudged a Wreck. Mr. Justice BLACKSTONE explains the Words to mean “any live Thing;” and says “that in this Case, and as it seems
 • Lib. 1. c. 8. f. 11. pa. 281. “in this Case only, it is clearly not a legal Wreck.”* This Statute of *Westm. 1.* makes two Things necessary to the Preservation of the Owner’s Property: One is, the Escape of some live Thing; the Other, the Owner’s making Proof of his Property within a limited Time, (a Year and a Day.) The 27 E. 3. Stat. 2. c. 13. (which puts the Proof of the Ownership of the Goods, upon Marks Cockets or living Witnesses,) relates only to Cases which may *not* be called Wreck. But if it be Wreck, then the Goods are not to be delivered, upon any Proof whatsoever. It case it be *not* Wreck, they are to be delivered upon proper Proof: If it *be* Wreck, they are not to be delivered at all. But “*Whether* it be, or be not “Wreck,” must depend upon the former Acts of Parliament. The Case of *Newport* against Sir Henry Nevil, 5 E. 3. 3. cited in 5 Co. 107. ^a shews how the Old Acts of Parliament were then understood. Whether the Doctor and Student is right, or Whether the Judges who determined Sir Henry Constable’s Case were right, as to the Question “Whether the Statute of *Westm. 1.* “1. was a new Law, or only a Declaration of the Common “Law,” this Charter of King Henry the 2d. is equally decisive as to the Criterion of a Wreck. Sir Henry Constable’s Case says “that it was only a Declaration of the Common Law;” and cites *Bracton*, to prove *this* Point, against the Opinion of the Doctor and Student. But the Judges who determined that Case

Case do not adopt the Opinion of *Bracton* generally; but *only so far* as relates to that particular Difference between Him and the Doctor and Student. And Lord *Coke's* own Opinion seems to be otherwise: For, in his Comment upon this Statute, in 2 *Inst.* 167. 168. he says "that the three Instances, of a Man, a Dog, or a Cat, are put for Examples; For, besides these two Kinds of Beasts, All other Beasts Fowls Birds Hawks and other *living* Things are understood, whereby the Ownership or Property of the Goods may be known:" To which he adds these Words—"And *Bracton* yet goeth farther, *si certa Signa opposita fuerint Mercibus et aliis Rebus &c;*" Which Expression "yet goeth farther" is equivalent to saying, "Here *Bracton* goes beyond what is my own Opinion." No Case is cited subsequent to Lord *Coke's* Time: And the concurrent Testimony of ancient Charters, ancient Acts of Parliament, and ancient Writers except *Bracton*, is on our Side; And *Bracton* stands unsupported by any other Writer, and contradicted by the *Mirroure*, the Charters, and the Old Acts of Parliament; And modern Statutes consider the Escape of no *living* Creature, as the Test of a Wreck. The 26 G. 2. c. 19. § 1. makes it Felony, to plunder a wrecked Vessel, whether any *living* Creature be on board it, or not. *Bracton*, who was a Doctor of the Civil Law, has confounded the Law which he did understand with the Law which he did not understand. Mr. Justice BLACKSTONE says, "that in the Statute of W. 1. the Law is laid down, more agreeable to the Charter of King H. 2. and upon that Statute hath stood the legal Doctrine of Wrecks, to the present Time. It enacts, that if any *live* Thing escape (a Man, a Cat, or a Dog, which, as in *Bracton*, are only put for Examples,) in this Case, and, as it seems, *in this Case only*, it is clearly not a legal Wreck." *Lit. 1. c. 8. § 11. pa. 281.*

As to the 2d Point—It would not bear much Argument. They insisted, in general, that the Provisions in 27 E. 3. c. 17. were necessary to be complied with; That subsequent Statutes do not seem to vary the Provisions of it; that neither the Provisions of the One or of the Others have been properly complied with; and, particularly, that Salvage was not tendered in the manner that it ought to have been; and that, upon the Whole, the Plaintiffs had not sufficiently shewed a Right to reclaim, even supposing them not to have lost their Property by the Ship's being considered as wrecked.

LORD MANSFIELD—There is no sort of Doubt concerning the true Ownership of these Goods; which were cast away in a Storm, and recently pursued. Every Body else restored to the true Owner the Proportions that they had got of

them, upon a proper Salvage offered: This Defendant refused to deliver the Share that He had got; being forfeited, according to his Apprehension, as a *Wreck*, because no *live* Animal came ashore. He likewise objects to the Plaintiff's Recovering; because certain Forms, which he says were requisite to be performed, have not, as He alledges, been properly performed.

The first Question is "Whether these Goods are forfeited."

Now, no Case is produced, either at Common Law, or on the Construction of the Statute of 3 E. 1. c. 4. to prove that the Goods were forfeited, *because* no Dog or Cat or other Animal came *alive* to Shore. I will therefore presume, that there *never was* any such Determination; and that no Case could have been determined so contrary to the Principles of Law Justice and Humanity. The very Idea of it is shocking. And there is no Ground for such a Forfeiture, upon the Distinction that has been so much urged, between a Man or other Animal coming to Shore *alive*, or not alive. The coming to Shore of a Dog or a Cat alive can be no better Proof, than if they should come ashore dead: The Escaping *alive* makes no Sort of Difference. If the Owner of the Dog or Cat or other Animal was known, the Presumption of the Goods belonging to the same Person, would be equally strong, whether the Animal was alive or dead. If no Owner could be discovered, the Goods belonged to the King. But there ought to be a reasonable Time allowed to the Owner, to come in and claim them: And it was proper that the Time should be limited. The Old Limitation was a Year and a Day: Which was the Time limited in * many other Cases. The *Mode* of Proof was as it might happen. Goods are now, generally, marked: Perhaps, in ancient Days it might not be so common, or so accurate; And then a Dog or Cat might be a Presumption towards ascertaining the Owner of the Goods. *Bracton*, who wrote in the time of H. 3. says†—"Magis propriè dici poterit Wreccum, si Navis frangatur &c; nisi ita sit, quod verus Dominus aliunde veniens, per certa Indicia et Signa docuerit Res esse suas; ut si Canis vivus inveniatur &c: Et eodem modo, si certa Signa apposita fuerint Mercibus et alijs Rebus." And *Bracton's* Opinion has been recognized by later Writers. Lord *Coke*, in his fifth Report 17. says‡—that it appears from *Bracton*, that the Statute of W. 1. was but a Declaration of the Common Law; and cites the same Passage from *Bracton*—"Et quòd hujusmodi dici debet Wreccum, verum est, nisi sit quod verus Dominus aliunde veniens, certa Indicia et Signa donaverit Res esse suas; ut si Canis vivus inveniatur, et constare poterit quòd talis sit Dominus illius Canis; presumptivè ex hoc, Illum esse Domi-

* See 7 Co. 107.^b 108.^a

† Lib. 3. c. 3. pa. 120.^a

‡ See also 2 Inst. 166.

“ num illius Canis et illarum Rerum : Eodem modo, si certa Signa imposita fuerint Mercibus.” Thus it stands at the Common Law. Then, has the Statute of 3 E. 1. c. 4. altered the Common Law? No: Quite otherwise. And this Act was made in favour of the Owner. It enacts (negatively) “ that it shall not be Wreck, if Man, Dog, or Cat escape alive:” But it has no contrary (positive) Provision, “ that if neither Man, Dog, or Cat &c, escape alive, it shall belong to the King.” This Statute has been recognized as declaratory of the Common Law. The Words of it are—“ Concerning Wreck of the Sea, it is agreed that where a Man, a Dog, or a Cat escape quick out of the Ship, that such Ship, nor Barge, nor any Thing within them shall be adjudged Wreck; but the Goods shall be saved and kept &c, so that if any sue for those Goods, and after prove that they were his or perished in his Keeping, within a Year and a Day, they shall be restored to him without Delay: And if not, they shall remain to the King.” Lord Coke says that “ these three Instances (of a Man, Dog, or Cat,) are put but for Examples: For, besides these two Kinds of Beasts, all other Beasts, Fowls, Birds, Hawks and other living Things are understood, whereby the Ownership or Property of the Goods may be known.*” And this is agreeable * 2 Inst. 167, to the Charter of King Henry the 2d. which includes every Animal whatsoever. And this Escape of a Dog or Cat or other Animal is considered as a Medium of Proof, whereby the Ownership or Property of the Goods may be known.† If this was a recent Statute, it ought to be construed according to Reason and Justice. For, the Court ought not, unless they are absolutely obliged to it, to construe an Act of Parliament directly contrary to the Plain and clear Principles of Justice and Humanity: Which the Construction urged on the Part of the Defendant in this Case would undoubtedly be, in the highest Degree. But this is a Statute of very ancient Standing; and was declaratory of the Common Law, (as appears from *Bracton*, who wrote before the making of it;) and has been, since, sufficiently recognized; and no Case produced to the contrary, nor any Authority in Point. The other two Statutes are out of the Case: They do not relate to this Matter. Besides, here the Defendant has insisted upon Property. I am very clear, that the Direction was right; and that the Rule for a New Trial ought to be discharged.

Mr. Justice ASTON and Mr. Justice ASHHURST concurred with his Lordship.

Mr. Justice WILLES was absent.

All the Judges present being clear and unanimous,

THE RULE to shew Cause why there should not be a New Trial, was DISCHARGED.

Rex

Thursday,
6th of June
1771.

*V. ante, vol.
4. pa. 2186.
& 2203.

Rex versus College of Physicians.

* **T**HE Dispute between the College and the Licenciates had been of some Standing; and was carried on with some Eagerness on both Sides.

In *Michaelmas* Term, 9 G. 3. on *Thursday* 17th *November* 1768, Mr. *Morton*, supported by Sir *Fletcher Norton*, moved for a *Mandamus*, to be directed to the College, commanding them to admit into their Body and Fellowship Dr. *Edward Archer*; to whom they had, after the proper Examinations, in 1752, granted a *Diploma* to practice Physic in *London* and within seven Miles thereof. They produced an Affidavit of his having demanded an Admission into the Fellowship of the College, and of his having been refused. And Mr. *Walker*, at the same Time, made a like Motion on behalf of Doctor *Fothergill*. These Motions were intended, to try the Question “Whether the *Licenciates* “ had a *Right* to be *Fellows* or Members of the Faculty of Physic.” Rules were accordingly granted, to shew Cause, in both Cases: Both which Rules were made absolute, on the last Day of the following *Hilary* Term; and afterwards Writs of *Mandamus* were issued, and returned; And Doctor *Archer*’s came on to be argued on *Wednesday* the 22d of *November* 1769. The Writ and Return were as follows—

London—Our Lord the King hath sent to the President and College or Commonalty of the Faculty of Physic in *London* his Writ closed in these Words (that is to say) *George* the third by the Grace of God of *Great Britain France* and *Ireland* King Defender of the Faith, &c. To the President and College or Commonalty of the Faculty of Physic in *London*, Greeting. Whereas *Edward Archer* Doctor in Physic, having been duly examined and approved, was admitted to exercise the Faculty of Physic in the City of *London* and for seven Miles round the same, by the President and Commonalty of the Faculty of Physic in *London*, by the Letters of the said President, and College sealed with their Common Seal; and by reason of the Premises, the said *Edward Archer* became lawfully intitled to be admitted a MEMBER of the said College Commonalty and Corporation, and ought by you the said President and College or Commonalty of the Faculty of Physic in *London* aforesaid to be admitted a MEMBER of the said Corporation; And whereas the said *Edward Archer*, after he was as aforesaid admitted to exercise the Faculty of Physic in the said City of *London* and for seven Miles round the same as aforesaid, did tender and present himself to you the said

faid President and College or Commonalty of the Faculty of Physic in *London* in order to be by you admitted a Member of the said Corporation, and did then and there require and demand of you the said President and College or Commonalty of the Faculty of Physic in *London* aforesaid to be by you admitted a MEMBER of the said Corporation; yet you the said President and College or Commonalty of the Faculty of Physic in *London* aforesaid, well knowing the Premisses, but having no Regard for the Duty of your Office in that Behalf, did then and there without any reasonable Cause absolutely refuse and yet do refuse to admit him the said *Edward Archer* a Member of the said Corporation, In manifest Contempt of us, and to the great Damage and Grievance of the said *Edward Archer*, as we have been informed from the Complaint of the said *Edward Archer* made to us in that Behalf; We therefore, being willing that due and speedy Justice may be done to the said *Edward Archer* in this Behalf as it is reasonable, do command you, firmly enjoining you, that immediately after the Receipt of this our Writ you do without Delay admit or cause to be admitted the said *Edward Archer* a Member of the said Corporation together with all the Liberties, Privileges, Franchises, Emoluments and Commodities to one of the Members of the said Corporation belonging and appertaining; and that you do administer or cause to be administered to the said *Edward Archer* all the Oaths which are in such Case usually administered and taken; or shew us Cause to the Contrary thereof, that the same Complaint may not by your Default be again repeated to us: and how you shall have executed this our Writ, make it known to us at *Westminster* on *Wednesday*, next after five Weeks, from the Feast-day of *Easter*, then returning to us this our Writ; Upon Peril that may fall thereon. Witness *William Lord Mansfield*, at *Westminster*, the twelfth Day of *April* in the Ninth Year of our Reign. On which said *Wednesday* next after five Weeks from the Feast-day of *Easter* the said President and College or Commonalty of the Faculty of Physic in *London* returned the said Writ as followeth (that is to say) The Answer of the President and College or Commonalty of the Faculty of Physic in *London* within mentioned. We the within named President and College or Commonalty of the Faculty of Physic in *London* do most humbly certify and return to our Sovereign Lord the King at the Day and Place within mentioned, that true it is that the within named *Edward Archer* Doctor in Physic, having been for that Purpose duly examined and approved, was admitted to exercise the Faculty of Physic in the City of *London* and for seven Miles round the same, by the President and Commonalty of the Faculty of Physic in *London*, by the Letters of the said President and College sealed with their common Seal, as by the within Writ is alledged.

But we do further most humbly certify, that by reason of the Premises the said *Edward Archer* did *not* become lawfully intitled to be admitted a MEMBER of the said College Commonalty and Corporation, as by the same Writ is supposed: And therefore we the said President and College or Commonalty of the Faculty of Physic in *London* cannot admit or cause to be admitted the said *Edward Archer* a MEMBER of the said Corporation together with all the Liberties, Franchises, Emoluments, and Commodities to one of the Members of the said Corporation belonging and appertaining; nor can we administer or cause to be administered to the said *Edward Archer* the Oaths which are in that Case usually administered and taken, as by the said Writ We are commanded to do.

THOMAS LAURENCE President.

Serjeant *Glynn* argued for Doctor *Archer*, That he was intitled to be admitted into the Fellowship of the College: And He relied on the Statute of 14, 15 H. 8. c. 5.

But LORD MANSFIELD and Mr. Justice YATES asked Him *How it appeared* that the Doctor was intitled to such Admission into the College? Observing, at the same Time, that the Statute he relied upon, was only a *private Act*, relating solely to a particular Body of Men.*

* The Words of it import nothing beyond a mere *Petition*.

Mr. Justice ASTON took Notice, that here is no Ground laid for such a Claim. It is nothing more than that he was examined and admitted *as a Licentiate*: and *therefore* he is lawfully intitled to be and ought to be admitted a Fellow and a Member of the Corporation. But how does that follow?

Mr. Justice YATES—He has shewn *no Colour of Title* to be so. How then can the Court issue a peremptory *Mandamus* to admit him? Here are no Premises whereupon to ground the Conclusion “that he is intitled to what he claims:” Here is no Title at all shewn, to support his Claim.

THE RULE therefore was, that the Writ be QUASHED.

Doctor *Fothergill's Mandamus* being like Doctor *Archer's*, the present Determination did in Effect determine Doctor *Fothergill's* also; though the latter was not now actually put into the Paper, and argued.

See Doctor *Groenvelt's Case*. 1 *Salk.* 144. 200. 263. 3 *Salk.* 265. 354. *Carthew* 421. 491. 12 *Mod.* 119. *Holt* 184. 395. 536. *Comberb.* 482.

In

In *Hilary Term* 10 G. 3. viz. on *Monday* 29th of *January* 1770, Mr. *Morton* and Mr. *Walker*, moved for new Rules of the like Kind, in favour of the same two Licentiates: And a few days afterwards, in that same Term, viz. on *Monday* 5th *February*, Both were made absolute; and new Writs of *Mandamus* were thereupon issued, and returned.

Doctor *Fothergill's* stood in the Crown Paper of *Saturday* 21st *April* 1771; and was then argued by Serjeant *Glynn*, for the Doctor, and Serjeant *Davy* for the College. It was not then determined, nor did the Court declare any Opinion: Indeed, they strongly recommended an Agreement between the very respectable Persons concerned in this Dispute. But those Gentlemen not shewing any great Inclination to a Compromise, it stood for further Argument: And it was now a second Time argued, by Mr. *Morton* for the Doctor, and Mr. *Wallace* for the College. It would be too tedious to specify the Arguments at large. But as they all arose out of the new *Mandamus* and the Return to it, the stating of the Writ and Return (with Exactness and Precision) will convey to the Reader a Compleat Idea of the Nature of the Licentiate's Claim and the College's Defence, and of the whole Constitution of this learned Faculty; and will enable him to judge for himself, what were the proper Arguments to be drawn therefrom, as well as explain to him the Reason upon which the Court rejected the Claim of the Licentiates "to be admitted Members of the Corporation."

This New Writ and Return were as follows—

London, (to wit) Our Lord the King sent to the President and College or Commonalty of the Faculty of Physic in *London* his Writ closed in these Words, (that is to say,) *George* the third by the Grace of God of *Great Britain, France, and Ireland*, King, Defender of the Faith and so forth—To the President and College or Commonalty of the Faculty of Physic in *London*, Greeting. For that Whereas by a certain Act of Parliament made at a Sessions of Parliament held at *Westminster* in the third Year of the Reign of our Royal Ancestor *Henry* the Eighth late King of *England* and so forth, Intituled an Act concerning Physicians and Surgeons, Reciting that for as much as the Science and Cunning of Physic and Surgery (to the perfect Knowledge whereof be requisite both great Learning and ripe Experience) was daily within this Realm exercised by a great Multitude of Ignorant Persons of whom the great Part had no Manner of Insight in the same nor in any other Kind of Learning; some also can read no Letters on the Book; so far forth that common
Artificers,

Artificers, as Smiths Weavers and Women, boldly and accustomedly took upon them great Cures and Things of great Difficulty, in the which they partly used Sorcery and Witchcraft, partly applied such Medicines unto the Disease as were very noxious and nothing metely therefore, to the high Displeasure of God, great Infamy to the Faculty, and the grievous Hurt Damage and Destruction of many of the King's Liege People, most especially of them that could not discern the Uncunning from Cunning; It was therefore amongst other Things Enacted by the Authority of the said Parliament, that no Person within the City of *London* nor within seven Miles of the same take upon him to exercise and occupy as a Physician or Surgeon, except he should be first examined approved and admitted by the Bishop of *London*, or by the Dean of Paul's for the Time being, calling to him or them four Doctors of Physic, and four Surgeons other expert Persons in that Faculty, and for the first Examination, such as they should think convenient, and afterward alway four of them that had been so approved; upon the Pain of Forfeiture for every Month that they did occupy as Physicians or Surgeons, not admitted nor examined after the Tenor of that Act, of Five Pounds, to be employed the one Half thereof to the Use of the said Sovereign Lord the King, and the other half thereof to any Person that would sue for it by Action of Debt, in which no Wager of Law nor Protection of Law should be allowed; and also whereas afterwards by a certain other Act of Parliament made at a Parliament of our said Royal Ancestor, at a Session thereof holden in the fourteenth Year of his Reign and from thence adjourned unto *Westminster* in the County of *Middlesex* the last Day of *July* in the fifteenth Year of the said late King, and then and there holden, reciting that in the most humble wise shew unto his said late Majesty his true and faithful Subjects and Liege Men *John Chamber*, *Thomas Linacre*, *Ferdinandus de Victoria*, his Physicians, and *Nicholas Halsewell*, *John Frances*, and *Robert Yaxley*, and all other Men of the same Faculty within the City of *London* and seven Miles about, that where his said late Majesty (by his most Gracious Letters Patent bearing date at *Westminster* the twenty-third Day of *September* in the Tenth Year of his said late Majesty's Noble Reign, for the common Wealth of this his said late Majesty's Realm in due exercising and practising of the Faculty of Physic and the good Administration of Medicines to be had, had incorporated and made of them and of their Company aforesaid one Body and Perpetual Commonalty of Fellowship of the Faculty of Physic, and to have perpetual Succession and Common Seal, and to choose yearly a President of the same Fellowship and Commonalty to oversee rule and govern the said Fellowship and Commonalty and all Men of the same Faculty

culty, with divers other Liberties and Privileges by his said late Highness to them for them granted for the common Wealth of this his said late Majesty's Realm, as in his said late Majesty's most Gracious Letters Patent more at large was specified and contained, the Tenor whereof followeth in these Words—*Henricus Dei gratia Rex Angliæ & Franciæ, & Dominus Hiberniæ, Omnibus ad quos Præsentis Literæ pervenerint saltem—Cum Regij Officij nostri Munus arbitremur Dicionis Honore Hominum Felicitati omni ratione consulere; Id autem vel imprimis fore, si Improborum Conatibus tempestive occurramus, apprimè necessarium duximus improborum quoque Hominum qui Medicinam magis avaricie sue Causa quam ullius bone Consciencie Fiducia profitebuntur, unde rudi & credule Plebi plurima incommoda oriantur, audaciam compescere; Itaque partim bene institutarum Civitatum in Italia & aliis multis Nationibus Exemplum imitati, partim gravium Virorum doctorum Johannis Chamber Thome Linacre Fernandi de Victoria, Medicorum nostrorum, Nicholai Halsewell, Johannis Francisci & Roberti Yaxley, Medicorum, ac præcipuè reverendissimi in Christo Patris ac Domini Thome Tituli scæ Cecilie transfiberim sacrosanctissime Romane Ecclesie Presbyteris Cardinalis Eborum Archiepiscopi & Regni nostri Angliæ Cancellarij charissimi, Precibus inclinati, Collegium perpetuum Doctorum & gravium Virorum qui Medicinam in Urbe nostra Londino & Suburbis intraque septem Millia Passuum ab ea Urbe quaque versus publicè exerceant, Institui Volumus atque Imperamus, Quibus tam sui Honoris tam publice Utilitatis nostre Cure ut speramus erit maliciosorum quorum meminimus Inscitiam temeritatemque tam Exemplo gravitateque sua deterrere, quam per Leges nostras nuper Editas ac per Constitutiones per idem Collegium condendas punire; quæ quo facilius Rite peragi possint, memoratis doctoribus Johanni Chamber Thome Linacre Fernando de Victoria Medicis nostris, Nicholao Halsewell, Johanni Francisco & Roberto Yaxley, Medicis, Concessimus quod ipsi omnesque Homines ejusdem Facultatis de & in Civitate prædictâ sint in Re & nomine unum Corpus & Communitas perpetua sive Collegium perpetuum, et quod eadem Communitas sive Collegium singulis Annis imperpetuum eligere possint et facere de Communitate illa aliquem providum Virum et in Facultate Medicine expertum in Presidentem ejusdem Collegij sive Communitatis, ac supervidendum recognoscendum et gubernandum, pro illo Anno, Collegium sive Communitatem prædictam et omnes Homines ejusdem Facultatis et Negocia eorundem; Et quod iidem Presidens et Collegium sive Communitas habeant Successionem perpetuam et Commune Sigillum Negotiis dict' Communitatis et Presidentis imperpetuum servitutum; Et quod ipsi et Successui imperpetuum sint Personæ habiles & capaces ad perquirendum et possidendum in Feodo et Perpetuitate terras et tenementa Redditus et alias Possessiones quascunque. Concessimus eciam eis*

et Successoribus suis, pro nobis et Heredibus nostris, quod ipsi et Successores sui possint perquirere sibi et Successoribus suis tam in dictâ Urbe quam extra terras et tenementa quecumque Annuum valorem duodecim librarum non excedentes, Statuto de Alienatione ad Manum mortuam non obstante; Et quod ipsi, per Nomina Presidentis Collegij seu Communitatis Facultatis Medicine London, placitare et implitari possint quorum quibuscumque Judicibus in Curiis et Actionibus quibuscumque; Et quod prædict' Presidens Collegium sive Communitas et eorum Successores Congregationes licitas et honestas de semetipsis, ac Statuta et Ordinationes pro salubri Gubernacione supervisu et Correctione Collegij seu Communitatis prædict' & omnes Homines eandem Facultatem in dictâ Civitate seu per septem Milliaria in Circuitu ejusdem Civitatis exercent', secundum Necessitatis Exigentiam quociens & quando Opus fuerit, facere valeant licite & impune sine Impedimento nostri Hered' vel Successor' nostrorum Justic' Escaetorum Vice-Comitum & aliorum Ballivorum vel Ministrorum nostrorum Heredum vel Successorum nostrorum quorumcumque. Concessimus eciam eisdem Presidenti & Collegio seu Communitati & Successoribus suis quod Nemo in dictâ Civitate aut per septem Milliaria in Circuitu ejusdem exerceat dictam Facultatem nisi ad hoc per dict' Presidentem & Communitatem seu Successores eorum qui pro Tempore fuerint admissus sit per ejusdem Presidentis & Collegii Literas Sigillo suo Communi Sigilatas, subpena Centum Solidorum pro quolibet Mense quo non admissus eandem Facultatem exercuit; Dimidium inde nobis et Heredibus nostris, et dimidium dict' Presidenti et Collegio applicandum. Preterea volumus et concedimus pro nobis et Successoribus nostris quantum in nobis est, quod per Presidentem et Collegium prædict' Communitatis pro Tempore existent' et eorum Successores imperpetuum quatuor singulis Annis per ipsos eligantur qui habeant supervisum et Scrutinium Correctionem et Gubernacionem omnium et singulorum dictæ Civitatis Medicorum Utensium Facultate Medicine in eadem Civitate, ac aliorum Medicorum forinsecorum quorumcumque Facultatem illam Medicine aliquo Modo frequentantium et Utensium infra eandem Civitatem et Suburbia ejusdem sive intra septem Milliaria in Circuitu ejusdem Civitatis, ad Punctionem eorundem pro Delictis suis in non bene exequendo faciendo et utendo illa, nec non supervisum et Scrutinium omnimodarum Medicinarum et eorum recept' per duos Medicos seu aliquem eorum hujusmodi Ligeis nostris pro eorum Infirmitatibus curand' dand' imponend' et utend', quociens' et quando Opus fuerit, pro Commodo et Utilitate eorundem Ligeorum nostrorum; ita quod Punctio hujusmodi Medicorum Utensium dictâ Facultate Medicine sic in Premissis delinquencium per Fines Amerciamenta et Imprisonamenta Corporum suorum et per alias Vias rationabiles et congruas exequatur. Volumus eciam et concedimus pro nobis Heredibus

Hereditibus et Successoribus nostris quantum in nobis est, quod nec Presidens nec aliquis de Collegio prædicto Medicorum nec Successores sui nec eorum aliquis exercens Facultatem illam quoquo Modo in futuro infra Civitatem nostram prædictam et Suburbia ejusdem seu alibi summoneantur aut ponantur neque eorum aliquis summoneatur aut ponatur in aliquibus Assisis juratis inquestis Inquisitionibus attinctis et aliis recogn' infra dictam Civitatem et Suburbia ejusdem impofterum, coram Majore ac Vicecomitibus seu Coronatoribus dictæ Civitatis nostre tempore existen' capiend' aut per aliquem Officiarium seu Ministrum suum vel Officiarios five Ministros suos summonend', licet iidem Jurati Inquisitiones seu Recognitiones sum' fuerint super brevi vel brevibus nostris vel Heredum nostrorum de recto; sed quod dicti Magistri five Gubernatores ac Communitas Facultatis ante dictæ et Successores sui et eorum quilibet dictam Facultatem exercentes, versus nos Heredes et Successores nostros ac versus Majorem et Vicecomites Civitatis nostre prædictæ pro tempore existent', et quoscunque Officiarios et Ministros suos sint inde quieti et penitus exonerati imperpetuum per Presentes. Proviso quod Literæ nostre seu aliquid in eis content' non cedent in Prejudicium Civitatis nostre London seu Libertatis ejusdem. Et hoc absque Fine seu Feodo pro Premissis seu Sigillatione Presentium nobis faciendi solvendi vel aliquo Statuto Ordinatione vel Actu in contrarium ante hac Tempora facta edita ordinata, seu provis' in Aliquo non obstante. In cujus Rei Testimonium has Literas nostras fieri fecimus Patentes Teste meipso apud Westminter Vicefimo tercio Die Septembris Anno Regni nostri Decimo. Per ipsum Regem, et de Data prædicta, Auctoritate Parlamenti.

Tunstall—And further reciting—And for so much that the making of the said Corporation was meritorious, and very good for the common Wealth of that his said Majesty's Realm, It was therefore expedient and necessary to provide that no Person of the said Politick Body and Commonalty aforesaid be suffered to exercise and practise Physic, but only those Persons that be profound sad and discreet, groundedly learned and deeply studied in Physic. And it was also further enacted, That in consideration thereof, and for the further authorizing of the same Letters Patent, and also enlarging of further Articles for the said Commonwealth to be had and made, It was and is amongst other Things Enacted that the said Corporation of the said Commonalty and Fellowship of the Faculty of Physic aforesaid, and all and every Grant Article and other Thing contained and specified in the said Letters Patent, be approved granted ratified and confirmed in the said Parliament, and clearly authorized and admitted by the same good lawful and available to the said Body Corporate and their Successors for ever, in as ample and large Manner as it might be taken thought and

construed by the same Letters Patent; And that the Six Persons in the aforesaid Letters Patent named as Principals and first named of the aforesaid Commonalty and Fellowship, choosing to them two other of the aforesaid Commonalty, from thenceforth should be called and cleaped Elects; and the same Elects yearly should choose one of them to be President of the said Commonalty; and as often as any of the Rooms and Places of the same Elects should fortune to be void by Death or otherwise, then the Survivors of the said Elects, within thirty or forty Days next after the Death of them or any of them, should choose name and admit one or more as Need should require of the most cunning and expert Men of and in the said Faculty in *London*, to supply the said Room and Number of Eight Persons; So that he or they that should be so chosen be first by the said Supervisor straitly examined, after a Form devised by the said Elects, and also by the same Supervisors approved. And further reciting that where that in Dioceses of *England* out of *London* it was not light to find alway Men able to sufficiently examine, after the Statute, such as should be admitted to exercise Physic in them, It was also by the said Act further Enacted that no Person from thenceforth be suffered to exercise or practice in Physic through *England*, until such Time that he be Examined at *London* by the said President and three of the said Elects, and to have from the said President or Elects Letters Testimonial of their Approving and Examination; Except he be Graduate of *Oxford* or *Cambridge* which had accomplished all Things for his Form without any Grace; as by the said Act, amongst other Things, appears. And whereas by another Act of Parliament, at a Sessions thereof held at *Westminster* in the Thirty-second Year of the Reign of our said Royal Ancestor the said late King *Henry* the Eighth, Intituled for Physicians and their Privilege, in the Preamble whereof is contained as follows—In most humble wise sheweth unto your Majesty your true and faithful Subjects and Liege Men the President of the Corporation of the Commonalty and Fellowship of the Science and Faculty of Physic in your City of *London*, and the Commonalty and Fellows of the same, that Whereas divers of them many Times having in Cure, as well some of the Lords of your most Honourable Council, and divers Times many of the Nobility of this Realm, as many other of your faithful and Liege People, cannot give their due Attendance to them and other their Patients, with such Diligence as their Duty were and is to do, by reason they be many Times compelled as well within the City of *London* and Suburbs of the same, as in other Towns and Villages, to keep Watch and Ward, and be chosen to the Office of Constable and other Offices within the said City and Suburbs of the same and other Places with-

in this your Realm, to their great Fatigation and Unquieting, and to the Peril of their Patients by reason they cannot be conveniently attended, it was therefore by the Authority of the same Parliament, amongst other Things, Enacted ordained and established, that the President of the said Commonalty and Fellowship for the Time being, and the Commons and Fellows of the same, and every Fellow thereof that then was or any Time thereafter should be their Successors, and the Successor of every of them, at all Time and Times after the making of the said Act, should be discharged to keep any Watch or Ward in his said City of *London* or the Suburbs of the same or any Part thereof; And that they nor any one of them should be chosen Constable or any other Officer in the said City or Suburbs; and that if at any Time thereafter the said President for the Time being, or any of the said Commons or Fellows for the Time being, by any Ways or Means be appointed or elected to any Watch or Ward Office of Constable or any other Office within the said City or Suburbs, the same Appointment or Election should be utterly void and of none Effect; any other Custom or Law to the Contrary before that Time used in the said City notwithstanding; And that for the common Wealth and Surety of his loving Subjects of this his Realm in and for the Administration of Medicines to such of his said Subjects as should have need of the same, from thenceforth the said President for the Time being, Commons and Fellows, and their Successors, might yearly, at such Time as they should think most meet and convenient for the same, elect and choose four Persons of the said Commons and Fellows, of the best learned wisest and most discreet, such as they should think convenient, and have Experience in the said Faculty of Physic; and that the said four Persons so elected and chosen, after a corporal Oath to them ministred by the said President or his Deputy, should and might, by virtue of the said Act, have full Authority and Power, as often as they should think meet and convenient, to enter into the House or Houses of all and every Apothecary then or at any Time thereafter Using the Mystery or Craft of Apothecary within the said City only, to search view and see such Apothecary's Wares Drugs and Stuffs as the said Apothecaries or any of them had or at any Time thereafter should have in their House or Houses; and all such Wares Drugs and Stuffs as the said four Persons should then find defective corrupted and not meet nor convenient to be ministred in any Medicines for the Health of Man's Body, the same four Persons, calling to them the Warden of the said Mystery of Apothecaries within the said City for that Time being, or one of them, should cause to be brent, or otherwise destroy the same as they should think meet by their Discretion; and if the said Apothecaries or any

of them at any Time thereafter did obstinately or wilfully refuse or deny the said four Persons yearly elected and chosen as before said to enter into their said House or Houses for the Causes Intent and Purpose before rehearsed, that then they and every of them, so offending contrary to the said Act, for every Time that he or they did so offend, should forfeit One Hundred Shillings; the one Half to our said Royal Ancestor, and the other Half to him that would sue for the same by Action of Debt Bill Plaint or Information in any of the King's Courts; wherein no Wager of Law Effoin or Protection should be allowed; and if the said four Persons or any of them so elected and chosen as before was said did refuse to be sworn, or after his said Oath to him or them administered did obstinately refuse to make the said Search and View once in the Year at such Time as they should think most convenient by their Discretion, having no Lawful Impediment by Sicknes or otherwise to the contrary, that then for every such wilful and obstinate Default every of the said four Persons making Default should forfeit Forty Shillings. And further it was recited in the said last mentioned Act, that forasmuch as the Science of Physic did comprehend include and contain the Knowledge of Surgery as a Special Member and Part of the same, It was also in and by the said Act further Enacted, that any of the said Company or Fellowship of Physicians, being able, chosen and admitted by the said President and Fellowship and Physicians, might from Time to Time, as well within the City of *London* as elsewhere within this Realm, practice and exercise the said Science of Physic in all and every his Members and Parts; any Act Statute or Provision made to the contrary notwithstanding; as by the said Act, amongst other Things, more fully and at large appears. And Whereas also by a certain other Act of Parliament, made at a Sessions of Parliament holden at *Westminster* in the First Year of the Reign of our Royal Ancestor Lady *Mary* the First, late Queen of *England* and so forth, Intituled an Act touching the Corporation of the Physicians in *London*, reciting that Whereas in the Parliament holden at *London* the fifteenth Day of *April* in the Fourteenth Year of the Reign of our late Sovereign Lord King *Henry* the Eighth, and from thence adjourned to *Westminster* the last Day of *July*, in the fifteenth Year of the Reign of the same King, and there holden, It was Enacted that a certain Grant by Letters Patent of Incorporation made and granted by our said late King to the Physicians of *London*, and all Clauses and Articles contained in the same Grant, should be approved granted ratified and confirmed by the same Parliament, It was and is further Enacted, amongst other Things, by the Authority of the said Parliament, that whensoever the President of the

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the College or Commonalty of the Faculty of Physic of *London* for the Time being, or such as the said President and College should Yearly, according to the Tenor and Meaning of the said Act, authorize to search examine correct and punish all Offenders and Transgressors in the said Faculty, within the same City and Precinct in the said Act expressed, should send or commit any such Offender or Offenders, for his or their Offence or Disobedience contrary to any Article or Clause contained in the said Grant or Act, to any Ward Goal or Prison within the same City and Precinct, (the *Tower of London* excepted,) That then from Time to Time the Warden Gaoler or Keeper, Wardens Goalers or Keepers, of the Wards Goals and Prisons within the City or Precinct aforesaid (except before excepted) should receive, into his or their Prisons, all and every such Person and Persons so offending as should be so sent or committed to him or them as was aforesaid, and there should safely keep the Person or Persons so committed in any of their Prisons, at the proper Costs and Charges of the said Person or Persons so committed, without Bail or Mainprize, until such Time as such Offender or Offenders or Disobedients be discharged of the said Imprisonment by the said President and such Persons as by the said College should be thereunto authorized; upon pain that all and every such Warden Goaler or Keeper doing the contrary should loose and forfeit the double of such Fine and Amerciament as such Offender and Offenders or Disobedients should be assessed to pay by such as the said President and College should authorize as aforesaid, so that the same Fine and Amerciaments be not at any one Time above the Sum of Twenty Pounds; the Moiety thereof to be employed to the Use of our Sovereign Lady the Queen her Heirs and Successors, the other Moiety unto the said President and College; all which Forfeitures to be recovered by Action of Debt Bill Plaint or Information in any of the Queen's her Heirs and Successors Courts of Record, against any such Warden Goaler or Keeper so offending; in which Suit no Essoin Wager of Law nor Protection should be allowed nor admitted for the Defendant. And it was also by the said last mentioned Act further enacted by the Authority aforesaid, that for the better Execution of the Search and View of Apothecary's Wares Drugs and Compositions according to the Tenor of a Statute made in the thirty-second Year of the Reign of the said late King *Henry* the Eighth, it should be lawful for the Wardens of the Grocers or one of them to go with the said Physicians in their View and Search; That if the said Warden or Wardens did refuse or delay his or their Coming thereunto forthwith and immediately when the said President or some of his College elect as aforesaid did call upon him or them, that then the said Physicians might
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and should execute that Search and View and the due Punishment of the Apothecaries for any their evil and faulty Stuff, according to the Statute last before mentioned, without the Assistance of any of the said Wardens; any Clause in the aforementioned Statute to the Contrary thereof notwithstanding; and every such Person or Persons as would or should resist such Search should forfeit for every such Resistance Ten Pounds; the same Penalty to be recovered in Form aforesaid, without any of the Delays aforesaid, to be had in Suit thereof. And by the said Act It was and is further Enacted, That all Justices Mayors Sheriffs Bailiffs Constables and other Ministers and Officers within the City and Precincts above written, upon Request to them made, should help aid and assist the President of the said College and all Persons by them from Time to Time authorized for the due Execution of the said Acts or Statutes; upon pain, for not giving of such Aid Help and Assistance, to run in Contempt of the Queen's Majesty her Heirs and Successors. And Whereas *John Fothergill* Doctor in Physic, having been duly examined and approved, was admitted to exercise the Faculty of Physic in the City of *London* and for seven Miles round the same, by the President and Commonalty of the Faculty of Physic in *London*, by the Letters of the said President and College sealed with their Common Seal; And, by reason of the Premises, the said *John Fothergill* became Lawfully intitled to be admitted a Member of the said College Commonalty and Corporation, and ought by you the said President and College of the Commonalty of the Faculty of Physic in *London* aforesaid *to be admitted a Member of the said Corporation*; And Whereas, the said *John Fothergill*, after he was as aforesaid admitted to exercise the Faculty of Physic in the said City of *London* and for seven Miles round the same as aforesaid, *did tender and present himself to you the said President and College or Commonalty of the Faculty of Physic in London in order to be by you admitted a Member of the said Corporation*, and did require and demand of you the said President and College or Commonalty of the Faculty of Physic in *London* aforesaid to be by you *admitted a Member of the said Corporation*; yet you the said President and College or Commonalty of the Faculty of Physic in *London* aforesaid, well knowing the Premises, but having no Regard for the Duty of your Office in that Behalf, did without any reasonable Cause absolutely refuse and yet do refuse to admit him the said *John Fothergill* a Member of the said Corporation, In manifest Contempt of us and to the great Damage and Grievance of the said *John Fothergill*, as we have been informed from the Complaint of the said *John Fothergill* made to us in that Behalf; We therefore being willing that due and speedy Justice may be done to the said *John Fothergill*

in this Behalf as it is reasonable, do command you, firmly in-joining you, that immediately after the Receipt of this our Writ you do without delay admit or cause to be admitted the said *John Fothergill* a Member of the said Corporation, together with all the Liberties, Privileges, Franchises, Emoluments and Commodities to one of the Members of the said Corporation belonging and appertaining; or shew us Cause to the contrary thereof, that the same Complaint may not by your Default be again repeated to us; and how you shall have executed this our Writ, make it known to us at *Westminster* on *Friday* next after the Morrow of the *Holy Trinity*, then returning to us this our Writ, upon Peril that may fall thereon. Witness *William Lord Mansfield*, at *Westminster*, the Twenty-eighth Day of *May* in the Tenth Year of our Reign.—By the Court—Burrow. The Execution of this Writ appears in a certain Schedule hereunto annexed. On which Day (to wit) on *Friday* next after the Morrow of the *Holy Trinity*, the said President and College or Commonalty of the Faculty of Physic in *London* aforesaid returned the said Writ as followeth (that is to say,)

The Answer of the President and College or Commonalty of the Faculty of Physic.

We the President and College or Commonalty of the Faculty of Physic in *London*, in the Writ to this Schedule annexed mentioned, do most humbly certify and return to our present most serene Sovereign Lord the King, at the Time and Place in the said Writ likewise mentioned, that true it is such an Act of Parliament was made in the Third Year of the Reign of our late Sovereign Lord *Henry* the Eighth late King of *England*, &c, as in the said Writ is in that Behalf mentioned and supposed; And that such other Act of Parliament was made at a Parliament holden at *London* on the Fifteenth Day of *April* in the Fourteenth Year of the Reign of our said late Sovereign Lord King *Henry* the Eighth and from thence adjourned to *Westminster* the last Day of *July* in the Fifteenth Year of the said late King and there holden, as in and by the said Writ is in that Behalf mentioned and supposed; and that such other Act of Parliament was made in the Thirty-second Year of the Reign of our said late Sovereign Lord King *Henry* the Eighth as in the said Writ is in that Behalf mentioned and supposed; and that such other Act of Parliament was made in the First Year of the Reign of our late Sovereign Lady *Mary* the First late Queen of *England*, &c, as in the said Writ is in that Behalf mentioned and supposed; And that *John Fothergill* Doctor in Physic in the said Writ named, having been for that Purpose duly examined and approved, was admitted to exercise the Faculty

of Physic in the City of *London* and for seven Miles round the same, by the President and College or Commonalty of the Faculty of Physic in *London*, by the Letters of the said President and College or Commonalty sealed with their Common Seal, of the Date in the said Writ mentioned, as by the said Writ is in that Behalf mentioned and supposed: But we do further most humbly certify, that by reason of the Premisses the said *John Fothergill* did *not* become Lawfully intituled to be admitted a MEMBER of the said College and Commonalty and Corporation, as by the said Writ is above supposed. And we do further most humbly certify and return to our most serene Sovereign Lord the King, that ever since the making of the said Acts of Parliament in the said Writ mentioned, every Person admitted a Member of the said College or Commonalty, hath been and hath used and been accustomed to be, before his being admitted a Member of the said College or Commonalty, *elected* by the President and College or Commonalty aforesaid to be a Member of the said College or Commonalty; and that the said *John Fothergill* hath not been nor was *elected* by the President and College or Commonalty aforesaid to be a Member of the said College or Commonalty. And We do further most humbly certify and return to our said most serene present Sovereign Lord the now King, That after the making of the said several Acts of Parliament in the said Writ mentioned, and long before the said *John Fothergill* was admitted to the exercise of the Faculty of Physic in the City of *London* and seven Miles round the same as in the said Writ is mentioned, to wit on the First Day of February in the Year of our Lord One thousand five hundred and fifty-five, at an Assembly of the said President and College or Commonalty, a certain reasonable Statute Act and Ordinance commonly called a BY-LAW (not now extant in Writing) was made and ordained by the then President and College or Commonalty of the Faculty of Physic in *London*, whereby it was ordained that every Person thereafter to be admitted a Member of the said College or Commonalty should before his being admitted a Member of the said College or Commonalty be *elected* by the President and College or Commonalty aforesaid to be a Member of the said College or Commonalty; which said By-Law still is in full force and Effect, in no wise repealed reversed annulled vacated or made void; And that the said *John Fothergill* hath not been nor was *elected to be a Member* of the said College or Commonalty according to the Form and Effect of the said By-Law. And we do further most humbly certify and return to our said most serene Sovereign Lord the now King, that after the making of the said several Acts of Parliament in the said Writ mentioned, And long before the said *John Fothergill* was admitted

to exercise the Faculty of Physic as in the said Writ is mentioned, to wit on the First Day of *February* in the Year of our Lord One thousand five hundred and fifty-five, at an Assembly of the said President and College or Commonalty a certain reasonable Statute Act and Ordinance commonly called a BY-LAW (not now extant in Writing) was made enacted and ordained by the said President and College or Commonalty for the wholesome Government Overseeing and Correction of the said College or Commonalty and of all Men exercising the same Faculty in the City of *London* and within seven Miles round the same, whereby Persons then exercising or who should at any Time thereafter exercise the said Faculty of Physic in the City of *London* and within seven Miles round the same were distinguished into three Classes or Orders; namely, one Class consisting of the Members of the said College or Commonalty for the Time being, who were then and were to be from thenceforth called *Fellows* of the said College or Commonalty; another Class consisting of such Persons as had been or should be desirous of becoming Members of the said College or Commonalty, and had been or should be examined and approved of by the President and Censors of the said College or Commonalty to be *Candidates for Election* into the Society or Fellowship of the said College or Commonalty, who were then and were to be from thenceforth called *Candidates*; And the other Class to consist of such Persons as then were or at any Time thereafter should be *licensed* and admitted to exercise the said Faculty of Physic in the City of *London* and within seven Miles round the same, by the said President and College and Commonalty by their Letters sealed with the Common Seal of the said College or Commonalty; which last mentioned Class, not being Members of the said College or Commonalty, were then and were to be from thenceforth called *Permissi* or *Licentiates*; And that at the respective Times of making the Statutes Acts Ordinances or By-Laws herein after mentioned, and before and at the Time the said *John Fothergill* was admitted to exercise the Faculty of Physic as in the said Writ is mentioned, Persons exercising the Faculty of Physic within the City of *London* and seven Miles round the same were distinguished into the three Classes or Orders aforesaid, and well known by the respective Names of *Fellows*, *Candidates*, and *Licentiates*. And we do further humbly certify and return to our most serene Sovereign Lord the now King, That before the said *John Fothergill* was admitted to exercise the Faculty of Physic as in the said Writ is mentioned, that is to say on the fourth Day of *April* in the Year of our Lord One thousand seven hundred and thirty-seven, at an Assembly of the said President and College or Commonalty of the Faculty of Physic, a certain reasonable Statute Act and Ordinance commonly called a BY-LAW was made enacted and ordained by the
said

saïd President and College or Commonalty, for *regulating the Admission of Members* of the saïd College or Commonalty, whereby it was enacted and ordained, that Nobody should be admitted into the Society of the College who should not first have been of the Number of Candidates for one whole Year, or publicly read Physic for three Years in some University of *Britain*, or been Doctor of the Chair in some University of this Kingdom or ordinary King's Physician; which saïd last mentioned By-Law, from the Time of the Making thereof until and at the Time of the saïd Admission of the saïd *John Fothergill* to exercise the Faculty of Physic in the City of *London* and within seven Miles round the same, And until the first Day of *April* in the Year of our Lord One thousand seven hundred and sixty-five, continued in full Force and Effect. And we do further certify and return to our saïd most serene Sovereign Lord the now King, that on the First Day of *April* in the Year of our Lord One thousand seven hundred and sixty-five, at an Assembly of the saïd President and College or Commonalty, a certain other reasonable Statute Act and Ordinance commonly called a BY-LAW was made enacted and ordained by the saïd President and College or Commonalty of the Faculty of Physic aforesaid, for the Regulating of the Admission of Members of the saïd College or Commonalty, whereby *it was Enacted and Ordained, that Nobody should be admitted into the Order of Fellows who should not have been a CANDIDATE for one whole Year*; Except the King or Queen's ordinary Physician with Salary, or Royal Professor of Physic in the University of *Oxford* or *Cambridge*; which saïd last mentioned By-Law still remains in full Force and Effect, not reversed annulled repealed or vacated. And we do further most humbly certify and return to our most serene Sovereign Lord the now King, that the saïd *John Fothergill* is not nor ever was *Candidate for one whole Year* or any other Time, nor ever publicly read Physic for Three Years in any University of *Britain*, nor ever was Doctor of the Chair in any University of this Kingdom, nor is nor ever was King or Queen's Ordinary Physician with Salary or without Salary, nor is nor ever was Royal Professor of Physic in the University of *Oxford* or *Cambridge*. And we do further humbly certify to our most serene Sovereign Lord the now King, that after the Making of the saïd several Acts of Parliament in the saïd Writ mentioned, and before the saïd Admission of the saïd *John Fothergill* to exercise the Faculty of Physic as aforesaid, that is to say on the saïd *fourth Day of April* in the saïd Year of our Lord One thousand seven hundred and thirty-seven, at an Assembly of the saïd President and College or Commonalty, a certain other reasonable Statute Act and Ordinance commonly called a BY-LAW was made enacted

ed and ordained by the said President and College or Commonalty, *whereby, reciting that many practised Physic in the City of London whom the said President and College or Commonalty deemed altogether unfit to be adopted into the Number of Fellows or Candidates, either because they were not Britons by Birth, or had not taken the Degree of a Doctor, or were not sufficiently learned or sufficiently advanced in Age and Gravity, or for other like Causes, and yet might be able to serve the Public and do good to Men's Health, at least in some Cures, it was ordained and appointed, that, after due Examination and Approbation of the President and Censors, such Persons should be permitted to practice so long as they behaved themselves well: which said By-Law or Ordinance, from the Time of making thereof until and at the Time of the Examination Approbation and Admission of the said John Fothergill to exercise the Faculty of Physic in the City of London and within seven Miles round the same in the said Writ mentioned, and afterwards, was in full Force and Effect; and divers Persons from Time to Time applied to be, and according to and in pursuance of the last mentioned By-Law or Ordinance were, examined and approved of by the President and Censor of the said College or Commonalty for the Time being, and licensed and admitted to exercise the Faculty of Physic in the City of London and within seven Miles round the same, by the said President and College or Commonalty, by their Letters sealed with their common Seal; which Persons so examined approved and admitted to exercise the Faculty of Physic in the City of London and within seven Miles round the same, have been and are called and known by the Name of Licentiates. And we do further certify and return, that the said John Fothergill applied to the said President and College or Commonalty of the Faculty of Physic in London aforesaid to be by them licensed and admitted to exercise the Faculty of Physic in the City of London and within seven Miles round the same; and that the said John Fothergill was thereupon, according to and in pursuance of the last mentioned By-Law or Ordinance, examined and approved by the President and Censors of the said College or Commonalty, and was licensed and admitted by the said President and College or Commonalty according to the said last mentioned By-Law or Ordinance, by their Letters sealed with their common Seal, to exercise the Faculty of Physic in the City of London and for seven Miles round the same; which is the Examination Approbation and Admission of the said John Fothergill to exercise the Faculty of Physic in the City of London and within seven Miles round the same in the said Writ mentioned. And we do further certify and return to our most serene Sovereign Lord the now King, that the said John Fothergill never*

was examined approved or admitted to exercise the Faculty of Physic in the City of *London* and within seven Miles round the same, in any other Manner or for any *other Purpose* than as and in order to *his being a LICENTIATE as aforesaid*. And for these Reasons we cannot admit or cause to be admitted the said *John Fothergill* a MEMBER of the said Corporation, together with all the Liberties Privileges Franchises Emoluments and Commodities to one of the Members of the said Corporation belonging and appertaining, as by the said Writ we are commanded.

The general Drift of the Argument in support of the Claim of the Licentiates was, that the Charter meant to make them Members of the Corporation; that it equally incorporates every Man then practising the Faculty of Physic in *London*, and is not confined to the particular Persons named in it; that it includes all future Practisers, as well as those then existing; that a Person having a Licence becomes thereby One of the Body, and wants Nothing but the Form of Admission. This, they said, was the sound and legal Construction of the Charter. A Right to Admission is a Ground for a *Mandamus*, where that Admission is refused. They could not found their Right upon any Fact or Precedent; because there had been a constant Usurpation ever since the Charter. But no Usage or By-Law could control the Charter. And none of the Reasons given in the Return are sufficient to destroy the Licentiate's Claim. The College have duly examined him, approved him, and admitted him to practise, with full Testimonials of his Qualifications for it: And it don't lie in their Mouths, after this, to say that he is not fit to be admitted into their Body. They alleged, that the By-Law of the College exceeded their Power; and that their Usage is contrary to their Charter.

The Counsel for the College urged the Impropriety and Unfitness, that the lowest Licentiate should, by obtaining a mere Licence to practise Physic, be *ipso facto* invested with the important Offices of the College, and be trusted with those Regulations and Inspections which are committed to great and eminent Physicians. It is a Claim that was never thought of for near two hundred and fifty Years, that the contrary Usage has been acquiesced under. The Demand of Admission into the Corporation, upon a mere Licence *under this By-Law*, is unfair, uncandid, ungenerous, and unjust. It is a Fraud: It is contrary to the known Condition of the Licence, and to his own Agreement. It is a Breach of the Condition of the Licence. These By-Laws are a proper Check: No Man ought to be admitted into the College, without passing an Examination *as a Candidate*. The Licentiates know very well, that *their* Examination

nation reached only to those lesser Degrees of Learning Skill and Knowledge which might serve merely to qualify them to begin to practice in the Profession they had entered into. But it may very well be supposed, that many Persons who have been admitted such Licentiates merely to enable them to practise, would not have been judged worthy, upon a stricter Examination as Candidates for Fellowship, to become Members of the College. The College exclude none from practising, who may be of Service to Mankind. But the important Offices of the Members of the College require a considerable Degree of Learning Knowledge and Judgment. This Attempt aims at levelling all Ranks: It would confound all Distinctions, and make no Difference between the most learned and experienced Physician and the rawest Beginner.

LORD MANSFIELD said he had foreseen the Labyrinth and Maze of Litigation that this learned Body would be involved in by persisting rigidly on both Sides in pursuing the Points of their Dispute, and contesting about a Feather. He said he had read over all their Constitutions, Statutes, and By-Laws: And he intimated, that many of them are narrow, if not illegal.

This Matter came on, before, upon a Title not set out in the Writ. A Title is now set out: Which Title is a Licence from the College, after having been duly examined and approved, "to exercise the Faculty of Physic in the City of London and for seven Miles round the same." If that alone makes him *ipso facto* a Fellow of the College, there is no Need of Admission. The Return admits the four Acts of Parliament stated in the Writ, and also admits the Licence: but they deny it to be a Consequence, "that *by reason of the Premises* he became lawfully intitled to be admitted a MEMBER of the said College and Commonalty and Corporation, as by the Writ is supposed." Then they set forth the Usage ever since the Making of the Acts of Parliament, that every Person admitted a Member must be, before his being admitted a Member, *elect*ed to it by the President and College; and that the Doctor had never been so elected. Then they set forth a By-Law * to the same Effect; and that he has not been elected a Member according to that By-Law. They then set forth another † By-Law, which divides the Faculty into three Classes, *viz.* Members of the College; Candidates for Election into such Membership, (who were to be examined and approved of by the President and Censors to be Candidates for Election;) and *Licentiates* or *Permissi*. They set forth another ‡ By-Law, that no Body should be admitted into the Society of the College, who should

* 1st February

1555.

† 1st February

1572.

‡ 4th April

1737.

not

* 1st April
1765.

† 4th April
1737.

not first have been of the Number of Candidates for one whole Year, or publicly read Physic for three Years in some University of *Britain*, or been Doctor of the Chair in some University of this Kingdom, or Ordinary **King's** Physician. They set forth another * By-Law, that no Body should be admitted into the Order of Fellows, who should not have been a Candidate for One whole Year; except the King or Queen's Ordinary Physician with Salary, or Royal Professor of Physic in *Oxford* or *Cambridge*. They aver that the Doctor never was a Candidate for One whole Year, or any other Time; and that he did not come within any of the Exceptions in these two last mentioned By-Laws. Then they set forth a fifth By-Law (made at the same † Time with the third,) whereby, reciting "that many
" practised Physic in the City of *London*, whom the President and College or Commonalty deemed altogether unfit
" to be adopted into the Number of Fellows or Candidates,
" either because they were not *Britons* by Birth, or had not
" taken the Degree of a Doctor, or were not sufficiently learned or sufficiently advanced in Age and Gravity, or for other
" like Causes, and yet might be able to serve the Public and
" do good to Men's Healths, at least in some Cures," it was ordained that, after due Examination and Approbation of the President and Censors, such Persons should be PERMITTED TO PRACTISE, *so long* as they behaved themselves well. That many Persons, from Time to Time, applied to be, and according to and in pursuance of this last By-Law were, examined and approved by the President and Censors for the Time being, and licensed and admitted to exercise the Faculty of Physic in the City of *London* and within seven Miles round the same; and have been and are called and known by the Name of *Licentiates*. They add further, that Doctor *Fothergill* applied to the President and College, to be by them licensed and admitted to exercise the Faculty of Physic in the City of *London* and within seven Miles round the same; and that he was *thereupon*, according to and in pursuance of the last mentioned By-Law, examined and approved by the President and Censors, and was licensed and admitted by the President and Censors, according to the said last mentioned By-Law, to exercise the Faculty of Physic in the City of *London* and for seven Miles round it. And they aver *this* to be the Examination Approbation and Admission of him in the Writ mentioned; and that he never was examined approved or admitted to exercise the Faculty of Physic in the City of *London* and within seven Miles round the same, in any other Manner, or for any other Purpose, than as and in order to his being a LICENTIATE as aforesaid.

Now,

Now, be this By-Law good, or bad, Yet the Right of Admission into the College is claimed *under* it. It would be a most unreasonable Thing, to accept this Licence *under* the By-Laws, and yet to treat these By-Laws as null and void; to turn this Licence so accepted, against the Persons from whom it was thus accepted; and to set it up, as the Foundation of a Right to be admitted under the Charter. Therefore, as no other Foundation of such Right to be a Fellow is shewn, it comes round to the very Point upon which our former Determination turned: And I am of Opinion that the Return ought to be allowed.

Mr. Justice ASTON was entirely of the same Opinion, that supposing the By-Law to be bad; yet, as the Doctor came in *under* it, he was bound by it. As he claims his Title to the Fellowship under it, he can't now desert that Title claimed under the By-Law; and claim under the Charter. His Acceptance of the Licence under the By-Law contradicts his Claim under the Charter. And it would be a Fraud upon the College, to make this Use of their Licence, directly contrary to the manifest and acknowledged Intention of it. He also thought (with Lord Mansfield) That the Point had been, in Effect, determined upon the former Application.

Mr. Justice WILLES likewise thought that this came round just to the same Point that was determined before. He concurred with Lord Mansfield and his brother Aston.

Mr. Justice ASHHURST did the like; and thought that the former Determination governed this Case. Doctor Fothergill has accepted this Licence, *under* the By-Law. He ought not therefore now to suppose it a bad one; and yet, upon the Foundation of this very same Licence, to insist upon a Right under the Charter.

Per Cur' unanimously,

Let the RETURN be ALLOWED.

LORD MANSFIELD gave a Hint to the College, Whether they would think it adviseable to trust to a Return upon their present By-Laws; or whether they would not consider about mending them.

And I have been told, that they have since mended them.

Friday 7th
June 1771.

William Sellon, Clerk, *against* Roger Parry, Clerk.

THIS was an Action of Trespass on the Case, brought by the Plaintiff against the Defendant for Money had and received to the Plaintiff's Use: To which the Defendant pleaded "*Non Assumpsit*;" and thereupon Issue was joined.

The Cause came on to be tried at *Westminster-Hall*, at the Sitting after *Easter Term* 1771, Before Lord *Mansfield*; when the following Case for the Opinion of the Court was agreed to between the Parties; *viz.*—

It is agreed by and between the Reverend *William Sellon*, Clerk, Curate in the Perpetual Curacy of the Parish of Saint *James's Clerkenwell*, Plaintiff, and the Reverend *Roger Parry*, Clerk, Rector of the said Parish of Saint *John Clerkenwell*, Defendant, as follows—Whereas several Differences and Disputes have arisen and are still subsisting between the said Plaintiff and Defendant, touching the Right or Claim insisted on by the said Plaintiff to certain Sums of Money which have been received as Surplice Fees by the said Defendant, for Marriages Baptisms Churchings and Burials in the said Parish of St. *John*;

And whereas the said Plaintiff and Defendant are desirous of having the Determination or Judgment of a Court of Law concerning the said Right or Claim; and for that Purpose this Action is brought by the said Plaintiff against the said Defendant, in which he the said Plaintiff has laid his Damages at 80*l.* and in order to save the Trouble and Expence of bringing Evidence before the Court for ascertaining Facts on both Sides, It is agreed by and between the said Plaintiff and Defendant,

1st, That the said Defendant shall admit at the Trial of this Cause, that he has received the Sum of 10*l.* for Marriages Baptisms Churchings and Burials in the Parish of St. *John Clerkenwell*.

2dly, That the said Defendant shall admit at the said Trial, that the said Plaintiff has been duly Elected and Licensed to be Curate in the Perpetual Curacy of the Parish of St. *James Clerkenwell*, and accordingly invested with all the Rights and Emoluments belonging to the said Curacy.

3dly, That the said Plaintiff shall admit at the said Trial, that there is an Instrument or Deed inrolled in the High Court

of Chancery, whereby it appears, that the Commissioners under the Act for building fifty new Churches did, in the Year 1723, purchase a Chapel in the Parish of *St. James Clerkenwell*, and describe a District and Division out of the said Parish; which Chapel was afterwards consecrated, and the said Chapel and District were named and called by them *St. John's Church and Parish*: And that the said Plaintiff also shall admit a Copy of the said Instrument, so inrolled, to be read and received as Evidence in this Cause, instead of the Original Record.

But it is nevertheless insisted by the said Plaintiff, and admitted by the said Defendant, that the said Commissioners proceeded no further in the Division of the said Parish than the Purchase and Consecration of the said Chapel and describing the said District; and that no Agreement or Settlement hath at any Time been made by the Patrons of the Parish of *St. James*, for setting the Right of Patronage and Advowson of *St. John's*, and for more effectually dividing and separating the said Parish.

And lastly, that the said Plaintiff shall admit at the Trial, that the said Defendant hath been duly nominated to the Rectory of the Parish of *St. John*, and is Rector of the same under the said Act of Parliament.

That, besides the Facts agreed between the said Parties, it was proved and admitted that the Minister of *St. James Clerkenwell* had Married Baptised Churched and Buried in the said Parish of *St. James* since the Year 1723, and taken the Dues upon that Account as in like Manner before; And that the Rector of *St. John Clerkenwell* has done the same Offices of Marriages Baptisms Churchings and Burials of the Inhabitants and District of the New Chapel of *St. John's*, and received all the Dues upon that Account for his own Use, without ever accounting to the Minister of *St. James's Clerkenwell*.

The Jury found a Verdict for the Plaintiff; Damages 10*l.* and Costs 40*s.* Subject to the Opinion of the Court upon this Question—

“ Whether, under the Circumstances of this Case, the Plaintiff is intitled to recover.” And if the Plaintiff is not intitled to recover, then a Nonsuit to be entered—

Mr. *Dunning* argued this Case, for the Plaintiff: Mr. *Mansfield*, for the Defendant.

The

The Arguments of Both turned upon the Statute of 10 *Ann. c. 11*. Mr. *Dunning* cited the 11th 14th and 16th Sections: Mr. *Mansfield*, the 8th 10th 11th 14th and 15th. Mr. *Dunning*, in his Reply, relied upon the Proviso in the 16th "that the Act shall not deprive the Successors of the Rectors or Vicars of the Parish-Churches out of which any Part shall be taken, of any Tithes or other Profits, *until* such Agreement for dividing the Parish be made and inrolled."

LORD MANSFIELD—It says—"But that the Successors of the present Incumbents, *till* such Agreements and Settlements be made and take Effect, shall and may have hold and enjoy the said respective Rectories Vicarages and Curacies, and the Tythes, Dues, and Profits thereof, in as ample Manner as if this Act had not been made, and as the present Rectors and other Ecclesiastical Persons who are to hold and enjoy the same, during their respective Incumbrances, are of Right to hold and enjoy the same *." This is positive and in general Words: Which general Words take in every Thing, all Profits, as well as Tythes and Dues. It can't admit of a Doubt, that Surplice-Fees are included, as well as strict Dues. The Fact is, that the Old Rector has taken the Fees for what he has done in the *Old* Church and Church-yard; and the New Curate has taken the Fees for what *He* has done in the *New* Church and Church-yard. The Plaintiff must have the *Postea*.

RULE—That the *POSTEA* be delivered to the PLAINTIFF.

Friday 4th
June 1771.

Vaughan, on the Demise of Atkins Esq. *versus* Atkins, Widow.

THIS Cause was tried at *Winchester* Assizes held at the Castle of *Winton* the 5th of *March* 1771; and a Verdict found for the Plaintiff, subject to the Opinion of this Court, on the following Cate—

"That *Richard Kent* being seised in Fee of the Premises in Question, held of the Bishop of *Winchester* as of his Manor of *Bitterne*, by Copy of Court Roll, according to the Custom of the Manor, but not expressed to be at the Will of the Lord the 21st of *November* 1769, contracted, for a valuable Consideration of 1690*l.* to surrender the same to *John Atkins* Esq; and his Heirs (*prout* the Contract.)"

“ That *Atkins* entered into Possession 21st *December*, cut
“ Timber, and did other Acts of Ownership.

“ That afterwards, on the 9th *February* 1770, *Kent* surren-
“ dered the Premises, out of Court, to the Use of said *John*
“ *Atkins* and his Heirs.

“ That *John Atkins* died without Issue, the 15th of *April*
“ 1770, without being admitted to the said Premises, or the
“ said Surrender being presented, and before any Court was
“ held for the said Manor.

“ That on the twentyeth of *June* 1770, *Henrietta Atkins* the
“ Defendant, the Widow of the said *John Atkins*, was admit-
“ ted Tenant for her Life, and paid a Fine and a half for such
“ Admission; the whole Fine, in right of her late Husband,
“ which he would have paid on Admittance; the half, for her
“ own Life Estate.

“ That afterwards, on the 14th *September* 1770, *George At-*
“ *kins* the Lessor of the Plaintiff, the Brother and Heir of the
“ said *John Atkins*, was admitted Tenant, as Brother and Heir
“ of the said *John Atkins*, saving the Right &c, (prout both
“ Admissions;) and paid one Fine for the same, as for the Ad-
“ mission of the Heir.

“ That some Lands held of the said Manor are called Pur-
“ presture; others, Bond Lands.

“ That the only Difference between *Purpresture* and *Bond Land*
“ is this, that the *Purpresture* descends to the eldest Son; that
“ Tenants thereof are not intitled to a Right of Common; and
“ that no Heriot is due for the same.

“ That *Bond Land* descends to the Youngest Son; has a Right
“ of Common; and that a Heriot is paid on Death or Surren-
“ der of a Tenant thereof.

“ That Part of the Premises in Question was Bond Land,
“ which was held by twelve Copies; and Part *Purpresture*, held
“ by three Copies.

“ That *John Atkins* paid the Heriot on the Surrender; and
“ the Defendant paid the Heriot on his Death; who was Execu-
“ trix of the said *John Atkins*.

“ That the Custom of the Manor with respect to Widows
 “ Estate is this, that if the Husband dies seized, the Widow
 “ has a Right to be admitted to the Land, for her Widowhood,
 “ paying one Penny; or for the Term of her Life, paying half
 “ the Customary Fine certain.

“ That no Instance appeared, that any Purchaser or Heir be-
 “ fore Admittance was received as Tenant, or taken upon the
 “ Homage; nor any Instance of such being refused or offered.

“ That these Lands held of the said Manor, when entailed,
 “ are barred by Recovery suffered in the Lord's Court, by Plain-
 “ tiff; in which, the Demandant usually claims the Land as
 “ held at the Will of the Lord, according to the Custom of the
 “ Manor.

That on the Death of a Tenant, Proclamations are made
 for the Heir to come into Court, and Fine for his Lands.

The Question is—“ Whether the Plaintiff, on this Case,
 ought to recover.”

J. Mansfield.

J. Burland.

This Case was argued, on *Tuesday* the 7th of May 1771, by
 Mr. Grose for the Lessor of the Plaintiff, and Mr. Kerby for
 the Defendant.

As it is a Case of very curious Learning, and was very well
 argued at the Bar, and maturely considered by the Court, I will
 endeavour to give the very Words of the respective Speakers as
 nearly as I can—

Mr. Grose, for the Plaintiff—When this Cause went down to be
 tried, the Counsel for the Plaintiff, conceiving it to be the Case of
 a common Copyholder had no Idea of any other Question in the
 Cause, than that of the *Necessity of Admittance of John Atkins*, to in-
 title his Widow to the Estate she now claims: But it being ob-
 served at the Trial, that in the Admission of *Richard Kent*, who
 sold the Premises in Question to *John Atkins*, it was not expressed
 that he held those Premises *at the Will of the Lord*; it was
 desired that it might be so stated in the Case, with a View
 to a *Distinction* (if any such should afterwards be thought
 material) that might exist between *Customary Freeholds* and
Copyholds.

Should

Should the Court be of Opinion, that such a Distinction in the present Case is material; it is submitted that the Case should be sent down to be re-stated: For, "Whether Customary Freehold, or Copyhold," is a *Fact*, that ought to be found by the Jury. But as to the *present Question*, it is apprehended, that there is *no Distinction* between Customary Freeholds and Copyholds; but that both pass alike by Surrender and Admittance.

To this Purpose is *Bracton*, when he writes of the Tenants in Villein-Socage, who were what we now call Customary Freeholders.

Si autem Villanus Sockmannus Villanum Soccagium ad alium transferre voluerit, prius illud restituat Domino, vel fervienti si Dominus præsens non fuerit; & de Manibus ipsorum fiat Translatio ad alium, tenendum libere vel in Socagio, secundum quod Domino placuerit: Quia ille Villanus Sockmannus non habet Potestatem transferendi, cum Liberum Tenementum non habeat.

Bracton Lib.
2. c. 8. fo. 26.

Dare autem non possunt Tenementa sua, nec ex Causa Donationis ad alios transferre, non magis quam Villani puri: Et unde, si transferre debeant, restituunt ea Domino vel Ballivo;—& ipsi ea tradunt aliis in Villenagium tenenda.

Bracton Lib.
4. fo. 209.
& Co. Lit.
59.

Lord Coke, in his Treatise of Copyholds, calls them by the general name of *Copyholders*; except when he means particularly to distinguish them: Then he terms the Customary Freeholders, "*Tenants or Copyholders in Frank Tenement*;" The Common Copyholders he terms "*Copyholders in base Tenure*." But wherever he treats of *Admittance*, he makes *no Distinction* between them.

In his Commentary upon *Littleton*, he adopts the Idea of *Bracton*: So, after him, have the modern Books of Authority. And the Difference between Customary Freeholds and Copyholds is fully laid down by Lord Chief Justice Holt, in *Crowther and Oldfield*.

Crowther and Oldfield—Upon the Difference between Customary Freeholds and Copyholds, Ld. C. J. Holt said—The great Difference between Copyholds, and Customary Freeholds which pass by Surrender, is, that the Copyholder is in by Demise from the Lord; but in the Case of customary Freeholds, he is only an Instrument: and in pleading a Title to a Copyhold Estate,

Ld Raymond
1225. 1 Salk.
365.

Estate, it is sufficient to shew a Grant from the Lord; but in the other Case, it is not enough to shew the Lord granted it, but it must be shewn that the Surrenderer was seized in Fee, *and surrendered to the Lord, and that he granted it to the Surrenderer.*

Taking it then for granted, that as far as concerns the present Argument, there is no Difference; the Question will be

“ Whether the Defendant has a Right to retain the Possession of the Premises in Question, as the Widow of *John Atkins*, by virtue of the Custom, and under the Circumstances, stated in the Case.”

If she has any Title, it is under the Custom: If she has not, the Plaintiff, as Heir at Law to *J. A.*, must recover.

This Custom, under which the Defendant claims, and which is the *free Bench*, is considered by all Authorities, particularly in *Hob.* 181. as a Part of—a Fruit of—an Excrescence out of the Estate of the Husband. It is, in fact, the Estate of the Husband; which, for the Benefit of his Widow, is said to have Continuance after his Death, for a Period of Time described by the particular Custom of particular Manors; in some, during the Widow's Life; in others, during her Widowhood only.

To have Continuance, it must first exist. But it does not exist till the Husband is a *complete* Copyholder: and he is not a *complete* Copyholder until, in the Language of the Customs, he is *seized*.

For the true Idea of *Seizin*, we must resort to the ancient System of feudal Tenures.

By that System, *Seizin* was a technical Expression to describe the *Completion* of that Investiture, by which the Tenant was admitted into the Tenure, and without which no Freehold could be constituted or pass. *Sciendum et Feudum, sine Investitura nullo modo constitui posse.*

WITHOUT this *Seizin*, a Possession, was a naked Possession; by the Old Law called Intrusion.

In the Conveyance of Freeholds, where it was by Feoffment; after Feoffment, the Investiture was completed by Livery: In the Conveyance of Copyholds; after Surrender, it was *completed* by ADMITTANCE. And no Case is to be found, where ADMIT-

TANCE is not deemed as necessary to *complete* the Investiture, in the Conveyance of a Copyhold, as Livery is of a Freehold, where it passes by Feoffment; or as Inrolment, where it is conveyed by Bargain and Sale.

The Cases to prove "that Admittance is necessary," are many. The strongest I have endeavoured to select. They are these—

Admittance is the Life and Perfection of a Copyholder's Co. Copyh. Estate: And before Admittance, the Tenant is not a perfect 70. Copyholder.

Neither in the Grantee is any Manner of Interest vested before Admittance; for, if he enter, he is a Trespasser and punishable in Trespass; and if he surrender to the Use of another, this Surrender is merely void, and by no Matter *ex post Facto* can be confirmed.

Trafwell and Welch—Where after Surrender made, before Presentment, the Surrenderor, the Surrenderee, and the two Tenants into whose Hands the Surrender was made, died; the Heir of the Surrenderor entered, and made a Lease. Upon an Ejectment afterwards brought by the Heir of the Surrenderee, The Question was, "Whether the Lease was good?" And adjudged "that it was;" upon this Ground, that until the Surrender be presented in the Court of the Lord of the Manor, the Estate of the Lands doth remain in the Surrenderor, and nothing passeth thereby. Co. Copyh. 69. 3 Buller. 214. Cro. J. 403. Bridg. 52.

Baker and Denham—Surrender made, and *Cestuy que Use* died before the next Court, and so was not admitted: Resolved, that he was not a Copyholder within the Custom; for, by the Surrender, before Admittance, the Surrenderee hath no Possession; and the Heir of the Surrenderor is in by Descent, and holds by the Copy of his Ancestor; and so the *Cestuy que Use* is not a perfect or complete Copyholder. And it may be compared to the Case where a Man makes a Feoffment and Livery within View; it is no perfect Livery 'till he doth enter into the Lands; but the Feoffor may punish a Trespass there done in the interim; for, it is but *inchoatum*, until he enter: and so it is in the Case of a Copyholder; the Surrender is but *quasi inchoatum*, until he be admitted to the Copyhold. Co. Copyh. 70.

Galloway's Case—Where an Action was brought against the Lord for not holding a Court, and not admitting the *Cestuy que Use*; 70.

resolved that the Copyholder might have the Action; but that he to whom the Surrender was made, until Admittance by force of the Surrender, had nothing, and therefore could not maintain the Action.

Yelverton
144. 5.

Wilson and Weddal—Adjudged that the Surrender to *J. S.* of a Copyhold has no Effect until *J. S.* be admitted: and if *J. S.* surrender to a Stranger, who is admitted, this gives nothing to the Stranger; for *J. S.* had nothing, and so could pass nothing. And held that the Right and Possession remain in the Surrenderor; and that Right descends to his Heir. And a Difference was taken between an Heir to whom a Copyhold descended; he can surrender before Admittance; and well, because he is in by Course of Law; for, the Custom which makes him Heir, casts the Possession of his Ancestor upon him: but a Stranger to whom a Copyhold is surrendered, has nothing before Admittance; because he is a Purchaser.

Co. Copyh.
65.

If *Cestuy que Use* commit waste, it is no Forfeiture; for, by the same Reason he cannot grant before Admittance, he cannot forfeit before Admittance.

Gilb. Tenures
263.

Surrender and Admittance are one Conveyance, and operate as such: and therefore a Surrender to an Infant in *Ventre sa Mere* is good; for, says Lord Coke, a Surrender is a Thing executory, and nothing vests before Admittance.

2 Wilson 13.

Doe on Demise of *Jeffereys et al'* against *Hicks et al'*—Ejectment for Copyhold Lands surrendered to the Use of a Will; by which they were devised to Miss *Jeffereys*, who murdered the Testator, and was hanged for it, and never admitted—The Lord seized the Premises as forfeited, and granted to the Defendants—The Lessors of the Plaintiff were the Heirs at Law of the Testator and of Miss *Jeffereys*. The Question was “Whether these Lands were forfeited; as the Devisee was hanged before Admittance.” Judgment for the Plaintiff: and said, in Case of a Devise of a Copyhold, nothing vests in the Devisee or Surrenderer, nor in the Lord; and until Admittance, the Estate in Law is in the Surrenderor. The Will may be laid out of the Case. For, as to Copyhold, it is considered as an Appointment: But Admittance is as necessary to a Surrender, as Inrolment to a Bargain and Sale, or Livery to a Feoffment. Argued a second Time: And Court of Opinion, That notwithstanding the Surrender, before Admittance Miss *Jeffereys* had no legal Interest in the Estate; and so could have no legal Right to recover it; and neither having *Jus in Re* nor *ad Rem*, could forfeit nothing.

If

If these *Dicta* by Lord Coke, and the Cases cited, are Law, *John Atkins*, not being admitted, was so far from being a Copyholder, or seized, that he was liable to an Action of Trespass; and having entered, though he might commit Waste, could not forfeit. He could not surrender. If the Lord had refused to admit him, he could have no Action against him. He had neither *Jus in Re* nor *ad Rem*: which I construe, That, being in Possession, it was a naked Possession; he had no Right to retain it; being out of Possession, he was remediless at Law, he had no Right to recover it. How then could he be seized? no more than a Feoffee, before Livery; or a Bargainee before Inrolment.

Upon these Principles therefore, “that no Estate of this Sort “could pass, unless the Investiture was completed;” and “that “the Investiture could not be completed without Admittance;” incontrovertibly established by the Cases cited; Mr. *Grose* argued that *I. A.* did not die seized; and therefore that his Widow is not within the Custom; that she had no Right to be admitted under it; and, for that Reason, can have no Right to retain the Premises against the Heir.

It may be objected; That if *I. A.* did not die seized, how can the Plaintiff claim as his Heir?

That his Claim is founded in Law, is not at this Day to be doubted; being settled in *Kite* and *Queinton's Case*, 4 Co. 25. and *Bunting* and *Lepinwell*, 4 Co. 296. The Principle upon which he was adjudged to take, is not there to be found: But from the two following Cases he may be considered to take as a Purchaser.

If a Copyholder of Inheritance surrenders to the Use of another and his Heirs; and he to whose Use the Surrender is made dies before Admittance; and then the Lord admits the Heir; he is in by Purchase, and not by Descent: For, he is in by the Lord; for, nothing vested in the Father before Admittance. Rol. Abridg: 6:7. Tr. 40
El. Moore's Case.

Blunt against *Clarke*—A like Point: And *Newdigate Justice* said, when the Father was a Purchaser, and died before Admittance; his Heir, being in, shall be in by Purchase. 2 Sid. 37.

Mr. *Kerby*, for the Defendant—

The Question is, “Whether the Plaintiff is intitled to recover the Possession of the Premises in question, by the Title “he has made out to them.” For, if he has not made out a clear Title in himself, it is immaterial in whom it is: For, he must rely entirely on his own Strength, and cannot avail himself of the Defendant's Defect of Title.

As

As this Case seems to be drawn up with a View to make this Question, viz. "Whether the Lands are *Copyhold merely*, " or *customary Freehold*." I must beg to lay that Consideration, in a great measure, out of the Case. For, if the Plaintiff would contend that the Lord is not a mere Instrument in Copyholds, as well as customary Freeholds; and that he stands on better Ground from considering them as Copyhold; I apprehend the Jury ought to have determined that Question *with him*, before he can legally derive any beneficial Consequences from raising that Question: For, he is (as has been already said) to *prove* the Lands to be such as he has a Right to.

But I shall not pass over a Fact which is stated, and clearly shews the Lands to be *customary Freehold*.

It is stated, that the Lands within this Manor are surrendered to a Man and his Heirs according to the Custom of the Manor, and are not expressed to be held at the Will of the Lord. The Omission or Insertion of these Words "*at the Will of the Lord*" does, I apprehend, make almost the only Difference between Copyholds and customary Freeholds: For, a Man cannot be a mere Copyholder, nor an Estate a mere copyhold Estate, tho' held *per Copiam Rotulorum et secundum Consuetudinem Manerii*, unless it is likewise said to be held *ad Voluntatem Domini*. To prove this, many *Diss.* in the Books might be referred to: But it will be sufficient for me to cite the Words in 2d *Ventr.* 143. In the Case of *Rogers and Bradly*, Replevin for taking a Cow. Defendant made Conusance as Bailiff to *William Trewman and Thomas Coll*, who claimed to be seised of the Reversion and Rent, by Surrender made to them at a Court of the Manor, and by Admittance of the Lord. *Per Curiam*, The Conusance is insufficient. "The Lands in question must " be deemed to be Freehold; because it was said they were " held according to the Custom of the Manor, and not at the " Will of the Lord": And the Lands could not be passed in that Form, without a special Custom to that Purpose.

It is stated and has been argued, that the Lands are *Bond Lands*; which tends to shew that they are Copyhold. But this cannot, as I conceive, make any Difference: for, the Denomination of the Land, or even the Nature of the Services, varying as they do in every Manor, cannot affect the essential Part of the Tenure; because Lands may be held by *villain* Services, and yet not be strictly Copyhold. So might a Freeman have held by villain Services, and yet not have been a Villain; as is said in *Kitchen* 176. However, it is unnecessary for me, in arguing for the

the Defendant, to make any Distinction between Copyhold and customary Freehold: but should my Client's Interest require the Aid of that Distinction, the Case, I apprehend, clearly furnishes it. However this Question may be determined, I cannot see that my Client's Right will be affected by any Decision upon that Point. But the Cases that I shall hereafter mention prove that there is not in Law any such Distinction.

It is stated, that *John Atkins*, the Surrenderee, purchased the Estate in question, for 1680 *l.*; that he entered, and took Possession; that he cut Timber, and did many other Acts of Ownership, from the Time of the Surrender to his Death; that no Court was held between the Surrender and his Death; that the Surrender was not, and indeed could not be, presented in his Life-time.

Upon this short State of the Case, the Lessor of the Plaintiff, as Brother and Heir at Law of the Surrenderee, contends that his Ancestor was so seised as that the Lands do by Law descend to him; but that he was not so seised as to intitle the Widow to her Free-bench.

But I hope he shall not be permitted so to argue. For, he has attempted to support his Title to a Verdict, thro' the Title only which his Ancestor had. If the Ancestor had no Title, he can derive none from him; and then there is an End of the Question: If he had, the *Widow* shall derive it from him, likewise.

As the Plaintiff has been labouring to establish a Title in the Ancestor, it shall not now lie in his Mouth to contend that he had none, and to retract that Argument.

Whatever might have been the Question, if the Widow of the *Surrenderor* or his Heir had laid Claim to the Estate upon the Supposition that it remains in *him* till Admittance of the *Surrenderee*, yet that Question ought not to be agitated by the Heir who claims thro' the *same Title* as the Widow: on the contrary, he shall be *stopped* from controverting that Title *under which* he brings the present Action.

Besides, the Heir must take the Estate, *subject* to the Custom of the Manor: Which must mean, that the Heir shall take that Estate which his Ancestor had, subject to the *Free-bench* of his Widow, if he left any. But he wants a *Preference* to be given to *his* Interest; or rather, insists that the Widow has *no* Interest at all.

But I apprehend the Court will not thus favour the Title of the Heir, at the Expence of the Widow: For, they are considered as claiming thro' the *same* Channel; Both claiming by Act of Law; insomuch that the *Widow* may legally do those Acts before her Admittance, which the *Heir* before Admittance may. Thus, in *Bac. Abr.* 2d Vol. 470, "If a Custom of a Manor be, that the Wife of a Copyholder, for her Life, shall have Free-bench *dum casta et sola vixerit*, after the Death of her Husband; the Law casts the Estate upon her, so that she shall have the Estate before Admittance, and may make a Lease for a Year, as any other Copyholder may."

In the Case of *Howard and Bartlett, Hobart* 181, the Widow's Free-bench is considered as a Branch of the Husband's Estate; so that it is said to be "an Excrecence of the Husband's Estate, which by Custom grows out of it even as a Descend; and that it is created and vested in her, by Law." To the same Purpose is *Cro. Jac.* 573. In *Bac. Abr.* 464, "The Widow is in before Admittance, in the same Manner as the Heir at Law. The same is said in 2d *Danv. Ab.* 184.

To these Authorities I must add, that the Widow was so much understood to enjoy the very Interest which the Husband has in an Estate, jointly with him, that it was a long Time doubted whether she needed to be admitted after the Husband's Death.

This Estate of Free-bench has, in a Variety of Cases, been compared to another Species of Estates created by the Law, the Estate of Tenant by the Curtesy. *Vide* 2d *P. Wms.* 640, 641. &c &c. So it is compared in 2d *Bac. Abr.* 265. Having made the Comparison, he seems to consider the Consequences; And says, "if a Copyhold Tenement descends to the Wife; and the Husband enters; but before Admittance the Wife dies; yet he shall be Tenant by the Curtesy: For, though before Admittance the Lord shall claim no Duty, as Fealty, Homage, &c, yet his Delay shall not prejudice a third Person."

But here the Case is much stronger in favour of the Widow; because she has it not in her Power to compel the Husband to reduce his Right into Possession: which was the Reason why the common Law allowed her Dower where her Husband had a bare Right. So it is in Law; as may be seen in many Parts of *Co. Lit.*

The Cases I have above alluded to, I use only to shew that the Law respects the Widow's Estate on the *same* Footing as the Heir's;

Heir's; that it commences at the same Time, and has the same legal Properties belonging to it. I must add too, that it has a *Preference* in Law, as well as Equity: for it is said to be *ex Provisione Legis*; which is favoured, because it is a reasonable Provision out of the Husband's Estate, for the Support of herself and the Family she may have had by him.

But it may be said, All this is very true, where the Law gives her any Estate at all; but that the Doctrine is here misapplied, because the Custom gives *no Estate* to the Widow but where the Husband *dies seised*; and that he was not seised, because he died before Admittance.

I shall endeavour to consider the Grounds on which this Argument has been, and in Reply must be, attempted to be maintained; and shall suggest such Observations as occur to me to be in favour of my Client.

First—That, *quoad hoc*, as to the Purpose of giving the Widow her Free-bench, the Husband was *completely seised*.

Secondly—That she is intitled to Dower, even of a *Trust* of a Copyhold.

Thirdly—That here is an *implied Admittance* of the Husband: which shall have the same Effect, as actual Admittance.

Fourthly—That the *actual Admittance* of the Heir is a *Completion* of the Ancestor's Title; so as to give him and his Estate, all the Incidents belonging to a perfect Estate, from the Time of the Surrender.

First---That, *quoad hoc*, as to the Purpose of giving the Widow her Free-bench, the Husband was completely seised. Which will depend upon considering the Operation of the Surrender; the Situation of the Surrenderor, the Lord, and the Surrenderee.

The Surrenderor did, for a *valuable Consideration*, part with the Interest and Possession, in pursuance of an Agreement made before the Surrender; by which Agreement the Surrenderee was to take the Rents and Profits from the *Time* the Surrender should be made.

He had so much parted with his Interest, by surrendering it for a valuable Consideration, that he *could not have revoked* the Surrender. Thus it is said in *Kitchen* 164. a Surrender for a valuable Consideration cannot be revoked: For, it is like the acknowledging a Fine before a Justice of Record. *Vide Comyns's Dig.* 386. for the same Doctrine.

The

The *Surrenderor's* Widow would *not* have been intitled to *her* Free-bench in it. *Benson & Scot*, 3 *Lev.* 385. 1 *Salk.* 185. *Com. Dig.* 387. "If a Copyholder, where by Custom the Widow shall have her Free bench, surrenders to *A.* and the Surrender is presented; and then he dies, and *A.* is afterwards admitted; he shall avoid the Free-bench: For, his Admittance has Relation to the Surrender:" The Surrender being for a *valuable Consideration* makes a very material Difference between the Surrenderor and Surrenderee, and distinguishes the present from all the Cases which can be cited on the other Side. So your Lordship said, in *Roe on Demise of Noden, v. Griffiths*, *Mich.* 7 *G.* 3. * "A Copyholder in Fee surrenders, for a valuable Consideration, to the Use of *B.* in Fee. *B.* makes his Will, and is afterwards admitted. This subsequent Admittance is no Revocation: For, *immediately upon a Surrender for a valuable Consideration*, the Interest is in the Surrenderee; and the Lord is only an Instrument compellable either by *Mandamus* from this Court, or by Decree in Chancery."

* V. ante,
Vol. 4.
pa. 1961.

Thus then the Interest is passed from the Surrenderor; and, I apprehend, according to your Lordship's Words, is in the Surrenderee; and nothing vests in the Lord, for he is a mere Conduit-pipe, made use of to compleat the formal Part of the Conveyance. And this in all Cases, *Copyhold* as well as *Customary Freehold*: for I do not find that he is compellable more in the one Case than in the Other. To prove this, I must cite a long Passage from *Co. Cop.* 91. "In Admittances" upon Surrender, the Lord is *to no Intent* reputed the Owner, but wholly an Instrument; and the Party shall be subject to no Charge of the Lord; for, he claims his Estate under the Party that made the Surrender: and in a Plaint in the Nature of a Writ of Entry in the *Per*, it shall be supposed in the Plaintiff by him, and not by the Lord. And as in Admittances upon Surrender, so in Admittances upon Descent, the Lord is used as a mere Instrument; *and no Manner of Interest passeth out of him*: And neither in the One nor in the other Case, is any Respect had to the Quality of his Estate in the Manor: For, whether he hath it by Right or Wrong, is not material; the Admittances shall *never* be called in question for the Lord's Title; for, they are *judicial* Acts, which the Lord is bound to execute."

From hence it appears, that the Lord is bound to admit in *all* Cases upon Surrender, without Distinction between Copyhold and customary Freehold: And it appears too, that no Interest vests in the Lord, or passeth from him. *Kitchin* 174.

“ If the *Lord be an Infant*, and admit, he cannot avoid it :
 “ For, *he is but an Instrument to convey, and parts with no E-*
 “ *state.*” In *Co. Cop.* 159, 160, 161. The Copyholder is in by
 him who made the Surrender, and not by the Lord.

Indeed, in *voluntary Grants*, to which the Cases on the other
 Side apply, an Interest passes from the Lord ; but in no Case of
 a Surrender.

That he is this mere Instrument which I have supposed, fol-
 lows clearly from hence, that he can neither narrow nor
 enlarge the Estate which the Surrender passes ; he cannot an-
 nex a Condition to it, nor admit without it, contrary to the
 Surrender : In fact, he must comply with the Terms of the
 Surrender in every Respect which the Custom will warrant, with-
 out departing or varying from it in any Degree.

To these Considerations I must add, that, of late Years espe-
 cially, the Surrender has been treated as the substantial Part of
 the Conveyance ; and the Admittance, as Form and Shadow on-
 ly ; and was so treated in the Case I have already cited, of
Noden and Griffiths, Mich. 7th G. 3d. which Doctrine is confirm-
 ed in *Co. Cop.* 96. in the following Words---“ The Admittance
 “ is principally for the Benefit, and not much for the strength-
 “ ening the Heir’s Title.”

The Arguments I have already used upon this Head will be
 greatly strengthened in the present Case, if it be recollected that
 the Surrenderee could not be admitted, because he *died before*
any Court was held, at which he could be admitted. And shall
 his Death make any Difference in the Question ? Surely not :
 For, had the Surrenderor died, or had the Tenants to whom the
 Surrender was made died, before Presentment, that would have
 made no Difference, but the Surrenderee would have been inti-
 tled to be admitted : *Vide Rol. Abr.* 501. *Co. Lit.* 62. expres-
 sly to this Purpose. As then the Death of the Surrenderor, or of the
 Tenants into whose Hands the Surrender was made, cannot al-
 ter the Effect of the Surrender, so I apprehend the Death of the
 Surrenderee, or *Cestuy que Use*, cannot. For, in *Co. Cop.* 89. it is
 said---“ If one surrender to two jointly, and one dies before
 “ Presentment, the other shall be admitted to the Whole.”
 The same Doctrine is affirmed in 2 *Danv. Abr.* 184. And in
Bac. Abr. 2d Vol. 476.—“ If he to whose Use the Surrender is
 “ made dies before Admittance, yet his Heir shall be admit-
 “ ted : For, upon Admittance, the Estate is in *Cestuy que Use*,
 “ from the Surrender, by Relation.”

If, upon these Authorities, the Death of the Surrenderor, of the Tenants, or *Cestuy qui Use*, cannot alter the Nature of the Interest given by the Surrender to *Cestuy qui Use*; and if the same Person is intitled upon their Deaths, as would have been if they had lived, and *Cestuy qui Use* had been admitted; the *Widow* must have the *same Title* as if the Husband *had been admitted*; and his Interest must *devolve* on her on his Death; and she has a Right to be admitted to her *Free-bench*, as an Excrecence out of the Husband's Estate, even as the Heir by Descent, according to the Opinion in *Hob.* 181.

Secondly—But supposing the Husband did not die seised of a *legal* Estate even to this Purpose, I am then to contend that the Widow is intitled to her *Free-bench* even of a *TRUST in a Copyhold*. Which I shall endeavour to do, very concisely, by referring the Court to some Cases where I apprehend the Question has been determined, and to Books where the Doctrine has undergone Consideration; which would have great Weight, (as I apprehend) even if the Reason and the Justice of the Case were as strongly against my Client, as they appear to be *with Her*.

In *Gilbert's Tenures*, 271, This Question is put—"Whether the Feme be *so* seised as to make her Husband Tenant by the Curtesy before Admittance." The Author answers it thus—"It seems reasonable it should, as well as the Possession of the Brother before Admittance, make the Sister Heir. And *by the same Reason, the Widow shall have her Widow's Estate, tho' her Husband was never admitted.*"

In this Passage, the Author had put some Cases where Persons are intitled to take an Estate from those who had the Right only and were not admitted: But first he considers how far the Heir is Tenant before Admittance; then secondly in the Case of Tenant by the Curtesy; and thirdly the Tenant in Dower; as will appear more fully, by referring to the whole Paragraph.

But the Widow, in *this* Case above all others, ought to have her *Free-bench*; because it was impossible, by the Act of God (which ought not to prejudice her Right) for the Husband to have been *admitted*. But he entred, and took Possession; and this, not only with the Consent, but by the express Agreement with the Surrenderor: which Entry was *all* that the *Alience* could do; and the transferring the Possession to the Interest for a valuable Consideration, was *all* that the *Surrenderor* could do. If the Surrenderee had not done so much, it would have been hard

hard to have prejudiced the *Widow*; because it was not in *her Power* to have compelled her Husband to have reduced his Right into Possession: which, as I said before, was the Reason why the Common Law gave the Widow Dower of a Seisin in Law.

From the Passage referred to in *Gilbert*, it seems that the very learned Author had been contemplating the very Question now before the Court; and, upon Deliberation, he has decided it in my Client's Favour.

But these are not the only Authorities on this Head for me to rely on. I must cite a Case where it was *determined* "that the Widow shall have her Dower of a Trust of a Copyhold:" And it was decided in Terms which seem to me have expressly decided this very Question.

In 2d *Vernon* 584, 585. *Otway v. Hudson*,—A Tenant in Tail of the Trust of a Copyhold Estate, with Remainders over. The Trustees refusing to surrender the legal Estate to him, he brought his Bill in *Chancery* for that Purpose; and, pending the Suit, went to the Lord's Court, to be admitted to surrender; but was refused, not having the legal Estate: And thereupon he made his Will, and gave the Estate to his Wife and Children; and the Plaintiff, who was the Widow, filed a Bill, stating that, by the Custom, every Widow of a Copyholder is intitled to her Free-bench: And altho' the Husband had not the legal Estate, yet he was Tenant in Tail of the Trust, and endeavoured to have the Estate at Law surrendered to him; And altho' the Trustees refused so to do in favour of the Remainder Man, yet that ought not to turn to her Prejudice. *Per Curiam*—"The Widow of *Cestuy que Trust* of a Copyhold ought to have Free-bench, as well as if the Husband had the legal Estate in him. In this Case, the Court compared it to the Case of Tenant by the Curtesy of a Trust, as well as of a legal Estate. Which Doctrine is recognized and determined in another Case in the same Book, page 681; and in *Bac. Abr.* 464, as far as it relates to the Tenant by Curtesy. This Case and Opinion is referred to and treated with great Respect, by Sir *Joseph Jekyll*, in *Sutton and Sutton*, 2 *P. Wms.* from Page 632 to 651: which was, where there was a Mortgage in Fee made before Marriage, the Widow upon paying the Mortgage Money, or keeping down a third of the Interest, was held to be intitled to Dower of the Equity of Redemption:—"For, Dower is a moral Right, more favoured in Law, having more Privileges belonging to it, than Tenant by the Curtesy.

The Court of Chancery will assist the Widow against the Heir at Law, where it will not a third Person. Thus the Widow or Doweress shall have the Trust of a satisfied Term removed, against the Heir at Law, tho' not against a Purchaser. Lord and Lady *Dudley*, Precedents in Chancery 241. In this Case, the Master of the Rolls said "That the Doweress has not
" only a legal, but a moral, Right to be provided for out of
" the Husband's Estate. She is therefore in the Care of the Law
" and a Favourite of it."

The Case before the Court (not to say more of it) is very much like one in 1 *P. Wms.* 722. *Frederick v. Frederick*; where a Man, for a valuable Consideration, had agreed with the City of *London* to take up his Freedom, but died before he was admitted; yet the Widow was determined to have her Dower according to the Custom, as the Widow of an admitted Freeman, tho' he never was admitted such. So in the Case of *D. of Hamilton* and *Ld. Mobun* 1 *P. Wms.* 121. Husband seised in Fee mortgages for Years; the Mortgagee never enters: the Wife, on the Death of the Husband, shall be endowed. *Per* *Ld. Chancellor*—When the Mortgagee never insisted to enter for his Mortgage, it would be hard that the Heir should insist on it, to prevent Dower. And therefore it was decreed for the Widow. To prove this Sort of Doctrine, the Case of *Lady Williams* and *Sir Bourchier Wray* is very strong.

Perhaps it may be said, that the Widow's Remedy, if any, is in the Court of Chancery. But I apprehend not: For, she could have only gone there, to have compelled the Lord to admit her; which he did voluntarily; and therefore there could be no Necessity to have gone into that Court, to have decreed that to be done which was done before.

So that I hope, from the several Cases I have alledged, and from the forcible Reasoning suggested by Sir *Joseph Jekyll* in favour of the Widow, in 2 *P. Wms.* that the Court will be of Opinion that the Widow is intitled to Dower even in a TRUST of a Copyhold Estate.

3dly—I shall contend that there was an IMPLIED Admittance; which shall operate to complete the Title of the Surrenderee, from the Time of the Surrender; and shall have the same Effect as an actual Admittance. For, whatever implies the Consent of the Lord "that *Cestuy que Use* shall be admitted according
" to the Surrender," is a sufficient Admission, or Acceptance of him as his Tenant. To prove this, I must first cite *Gilbert's*
I Tenures

Tenures, 266*. Who taking Notice that there had been two Cases * 2d Edition. which had been determined against Admittances by Implication, (It is pa. 282. in the 3d Edition.) says, if we look to the Reason of the Thing we may conclude " that whatever expresses the Lord's Consent to the Surrender, " shall amount to an Admission: For, it is his Consent only, " that is necessary to make the Surrenderee a Tenant, after " Surrender; and, what matters it whether that be done by " a *Dominus concessit, et admissus est*, or by any other Act that amounts to as much?"

The same is said in 1 *Rol. Abr.* 505. letter X. where the Lord's Acceptance of the Surrender amounts to Admission.

The Acceptance of a Fine or Rent from the Alienee amounts to Admission. If a Fine be accepted of one as Copyholder, or of the Tenants who took the Surrender, or from *Cestuy qui Use*, this is an Admittance. See 2 *Sid.* 61. 1 *Rol. Abr.* 505. *Gilbert's Tenures*, 267†. To the same Purpose is 2 *Bac. Abr.* 474. † 282. in 3d. Edition. who alludes to several other Cases, to support his Opinion.

2 *Com. Dig.* 389. Any Words, says he, which shew that the Lord accepts the Surrenderee as his Tenant, are sufficient: So is the Accepting of Rent from him.

All these Books prove, in the strongest Manner, that there may be Admittances *in Law* as well as in Fact; and declare that that which evinces that the Lord accepted the Alienee as his Tenant, or his Assent to the Alienation, is sufficient. If this be true, which cannot be controverted after the many Authorities I have cited, I have nothing to do but to prove that the Lord *did*, in the present Case, do Something to demonstrate his Assent. And this I hope to have as little Trouble to prove, as to maintain the Principle. It appears by the Case, that the Lord accepted of the Widow of the Surrenderee, or (as I beg leave to say) of the Surrenderee by the Hands of the Widow, the full Fine which he ought to have paid for his Admittance. That he took a Fine from her, for her Admission to her Free-bench; which he could have no Right to, unless her Husband was his Tenant and she took an Estate by virtue of her Husband's dying seised. That the Heir paid a Fine upon his Admission, as a Fine due for the Admission of the Heir. That the Lord took likewise a Heriot from the Widow, as a Heriot due on the Death of her Husband, as Tenant. But the strongest Circumstance of all is (and what I should contend would be sufficient to bring my Client's Claim within 2 *Sid.* 61. 1 *Rol. Abr.* 505, and *Gilbert's Tenures* 267,) that the Surrenderee himself paid the Lord a Heriot, as a Heriot or Fine due upon the Alienation. So that if

a *personal* Acceptance of the Surrenderee is necessary, (which I should contend is not,) that personal Acceptance exists in the present Case.

Perhaps it may be said that the Lord would be glad to take as many Fines as he could; and that the taking of them shall operate as an Estoppel to the *Lord's* saying the Surrenderee did not die seised; but ought not to prejudice third Parties. This is surely no Answer: For, the only Ground the Plaintiff has to stand on is this, that the Surrenderee did not die seised, because the Lord had not accepted or admitted him his Tenant. To this I answer, that Ground fails him, and the Assertion is not true: And I have a Right to shew that, by the Rules of Law, the Lord has by various Acts acknowledged that he accepted him as his Tenant. And this I prove, by saying that no particular technical Form of Admission is necessary; but that whatever shews that he is not prejudiced, and testifies his Approbation of the Alienation, is a virtual and effectual Admission of a Tenant.

I have already said that it is not necessary for the Fine, Rent, or Heriot to be paid by the Tenant himself; but that the Payment of either by the Steward, or Tenants to whom the Surrender is made, or by any other Person who represents him, shall be understood to be made by the Surrenderee himself. If so, then I shall contend that the Payment of the Fine for her Husband's Admission by the Widow shall have Relation back to the Time of the Surrender.

4thly—I am to contend that if an Admittance by Implication is not sufficient, yet that the actual Admittance of the *Heir* is a *Completion* of the Ancestor's Title; so as to give him (the Ancestor) a complete Estate with all its legal Consequences, from the Time of the Surrender.

Gilbert's Tenures, 207. “If he to whose Use the Surrender was, die before Admittance, yet his Heir shall be admitted: For, upon Admittance, the Estate is in the *Cestuy qui Use*, from the Surrender by Relation.”

The same Principle is recognized in 2 *Com. Dig.* 387, and several other Cases he cites to confirm his Opinion.

Thus the Assignee of a Bankrupt shall avoid all mesne Acts between the Assignment and his Admittance: For, when he is admitted, it has Relation back to the Bargain and Sale. And there-

fore if the Bankrupt afterwards dies, and his Wife is admitted, the Assignee, after Admittance, shall avoid it. *Cro. Car.* 569. 1 *Lill. Reg.* 455. An Admittance relates to the Surrender, and the Surrenderee's Title begins from thence. 2 *Com Dig.* 387. "all mesne Acts are destroyed by Admittance, by Relation." 3 *Lev.* 385.

The Case of *Benson and Scot* in 1 *Salk.* 185. is directly in point to prove this Relation. A Copyholder surrendered to the Use of Plaintiff, in Fee; and died, leaving a Wife, who claimed her Free-bench by the Custom. At the next Court, the Surrender was presented, and Plaintiff admitted. And the Question being "Whether the Surrenderee, or the Wife for her Free-bench, should have the Lands," it was adjudged for the Plaintiff: For, the Plaintiff's Title by Surrender shall have Relation back to the Admittance. If there be two Joint-tenants Copyholders in Fee; And one surrenders into the Hands of two Tenants to the Use of his Will, and makes his Will, and dies before Presentment, and the Surrender is afterwards presented; this binds the Survivor: For, being presented, it relates to the first Time of the Surrender. *Porter and Porter, Cro. Jac.* 100. Many of the Cases I have cited upon the other Heads prove the same. What shews that the Admittance must relate to the Surrender, is, that the Surrender is deemed to be the operative Part of the Conveyance: And if the Surrender and Admittance differ in the Nature, Quantity, or Commencement of the Estate, the Surrender must be attended to, and no Regard paid to the Terms of the Admittance: For, as I said before, if the Lord annexes a Condition to it which the Surrender did not, the Condition is void. To prove this, I might produce a String of Cases: but as it is too clear to make that necessary, I shall refer to 2 *Com. Dig.* 390. where many of them are alluded to, and where it is said that the Presentment ought to be *pursuant to the Surrender*; for, the Lord is only an Instrument; and the Surrenderee, when admitted, is in by the Surrender.

The Conveyance by Bargain and Sale, which requires Inrolment within six Months, agrees in this Point: For, upon Inrolment, the Bargainee is intitled by Relation, from the Time of executing the Bargain and Sale; the Inrolment being Matter of Form; which is proved, as I apprehend, by the Case I just cited from *Cro. Car.* 569.

To these Observations I shall add only one more—That the Law considers the Surrender and Admittance as one Conveyance, and just as if they had happened at one and the same Instant.

If

If then the Admittance is supposed to have Relation to the Time of the Surrender in all Respects, and even so far as to defeat all mesne Acts between the Surrender and Admittance, I apprehend the Admittance of the Heir must have Relation back to the Time of the Surrender, so as to give the *Cestuy qui Use* a complete Title, and to give his Estate all those Incidents which would have accompanied it if they had happened at the same Moment; and consequently, that the Widow, who would have been intitled if they had in fact so happened, shall have a Right to the Fiction of Law, especially against the Heir. And I hope that the Defendant, as the Widow of a Man who paid a valuable Consideration for the Lands in dispute, shall be permitted, upon some of the Grounds which I have suggested to the Court, to continue in the Possession of that Estate, as a reasonable Provision made for her by the Law; and that the Heir at Law, the Lessor of the Plaintiff, shall not, by the Judgment of the Court, be permitted to deprive her of it.

Mr. *Grose*, in reply, enforced his former Positions; and insisted that the Surrenderer never parted with his Interest; that it remained in him, and at his Death vested in his Heir; that the Person to whose Use the Surrender was made, was never seised; that his Heir is a Purchaser; that an equitable Ground, will not avail the Defendant, in a Court of Law; and that, in a Court of Equity, the Plaintiff could have shewn equitable Grounds in his Favour.

With regard to the Cases cited by Mr. *Kerby*, He said that those from *Gilbert's Tenures* did not prove Mr. *Kerby's* Position; neither do the Cases cited from *Moor* 171, and 1 *Anderfen* 192, in that Book*, come up to what Mr. *Kerby* would deduce from them. The Case of *Otway* and *Hudson* was determined, he said, upon its own particular Circumstances: and, in Opposition to it, he cited a Case of *Chaplin* and *Chaplin* in *Hilary* 1733, before Lord *Talbot*†. As to an implied Admittance—He observed that the Payment of the Heriot does not prove that Lord had admitted the Surrenderee, or consented that he should be his Tenant. The Words of the Custom are, “that if the Husband dies seised, the Widow has a Right, &c.” Here, he *did not* die seised: For, he had no Investiture.

* V. *Gilb. Tenures*, pa. 287, 288. in 3d Edition.
† V. 2d Vol. of *Abr. of Cases in Equity*, pa. 384. pl. 11. and 3 *Peere Wm.* 232.

Mr. *Grose* mentioned a Case cited by *Ld. Ch. Justice Holt* in delivering the Opinion of the Court in *Clements v. Scudamore*, as a Case not reported in any printed Book, but determined in 1660, 1661, *inter Hale* and—(v. 2 *Ld. Raym.* 1025.) And in *Bacon's Abridgment* pa. 278. Title “Bargain and Sale,” it is said that

if

if Lands are bargained and told, and the Bargainee dies before Inrollment, his Widow shall *not* be endowed. So, if a Man bargains and sells Lands by Indenture, and then a takes a Wife, and dies, and afterwards the Deed is inrolled, the Wife shall *not* be endowed.

LORD MANSFIELD said, the Court were very much obliged to the Gentlemen, for taking so much Pains in their Arguments; And he thought, Nothing could be added to them: Therefore there was no Need of any further Argument; but it might stand for the Opinion of the Court.

He hinted, however, that no Case in Point had been cited by Mr. *Grose*; nor any in Point, by Mr. *Kerby*, except out of *Gilbert*. The great Question is the RELATION of the *Admittance* to the TIME of the *Surrender*.

CURIA ADVISARE VULT.

And now LORD MANSFIELD delivered their Opinion;

What is stated relative to the Premises not being *Copyhold at the Will of the Lord* makes no Difference as to the *Question*: And therefore I shall consider it as a *general Point* common to all Estates which pass by *Surrender and Admittance*.

The Question is, "Whether the *Heir* of the Surrenderee who dies before Admittance, shall avoid the Free-bench or Customary Dower of the Widow, *because* he died before Admittance."

The Case has been extremely well argued: And therefore I shall be but short, in giving our Opinion; The whole having been exhausted in the Arguments.

In this Case, the Contract is for a Purchase and Sale.

The Surrender is the *substantial Part* of the Conveyance; and a *complete Execution* of the Contract, as between the *Vendor* and the *Vendee*.

The Surrender and the Admittance are different Parts of the *same Conveyance*. The *formal* effectuates the *substantial Part*; and therefore must *relate* to it. Both together make but *One Conveyance*. The Admittance must be pursuant to the Surrender; and consequently must *operate* as from the *Date* of it.

Penfor v. Surrender to *A.* before Admittance, Surrenderor dies: *A.* is afterwards admitted. *A.* shall avoid the Free-bench of the Widow of the Surrenderor: For, *A.*'s Admittance has Relation to the Surrender.

If One Joint-tenant surrenders to the Use of his Will; his Devisee shall take: For, the Admittance relates to the Surrender; and from that Time, severs the Joint-tenancy.

It is laid down, that the Lord is only an Instrument. That after Admittance, the Surrenderee is in by Him who made the Surrender. That although the Surrenderor, or the Tenants by whose Hands the Surrender was made, die; yet Presentment and Admittance afterwards, is good: And where He to whose Use the Surrender is made, before Admittance dies, his Heir shall be admitted. The true Reason is drawn from the Context, and given in *Bacon's Abridgement* *: "For, upon Admittance, the Estate is in *Cestui qui Use* from the Time of the Surrender, by Relation."

Moore's Case, Trin. 40 Eliz. referred to by Justice *Newdigate*, in the Case of *Blunt v. Clarke*, is not stated; nor does it appear, what the Question was. The Proposition in *Roll's Abr.* "that the Heir, being admitted, is in by the Lord, and not by him that made the Surrender," is contrary to Truth and to all the Authorities. The Lord is a mere Instrument; and cannot vary from the Surrender: And in the same Case of *Blunt and Clarke*, (reported afterwards in the same Book, † 2 *Siderfin* 61.) *Glynn*, Chief Justice, says—"If a Man seised of Copyhold in Burrough-English surrenders to the Use of *I. S.* and his Heirs; And *I. S.* dies before Admittance, leaving two Sons; the younger of them shall have the Land; because he is in by Descent, or at least by Force of the first Surrender, and so in Nature of a Descent." And it is said in the Treatise of Tenures ascribed to *Ld. Ch. B. Gilbert*, and I suppose written by him, "that || this Opinion seems to be very reasonable: For, "Heirs" was certainly there a Word of Limitation, and not of Purchase; and certainly there is as much Reason to adjudge the Heir in by Descent here, as there is to adjudge an Heir in by Descent, where a Recovery was had against the Ancestor, but not executed till after his Death; because the Use might have have vested during the Life of the Ancestor, and because the Execution hath a Retrospect. And in Truth, the Case of a Surrender is just the same: For, Admittance might have been in the Life of the Ancestor; and when it was had, it had

† It is a second Argument, and Determination of the Case.

‡ pa. 288. in the 3d Ed.

“ a *Retrospect*.” And in the Margin, he refers to Shelley’s Case in 1 Co. 106 where the opinion was, “ that the Execution “ had a Retrospect to the Recovery.”

With this Reasoning We agree; and are of Opinion, “ that “ upon *Admittance*, the Heir is in *by Descent*, from the *Surrender*, to which the *Admittance relates*.”

The Lessor of the Plaintiff, in this Case, is expressly admitted as *Heir*. The Law casts the Free-bench upon the Widow, just as it casts the Descent upon the Heir. The Admittance, *by Relation*, makes her Husband seised from the Date of the Surrender.

There is no Rule better founded in Law Reason and Convenience, than this, “ That all the several Parts and Ceremonies “ necessary to complete a Conveyance shall be *taken together*, as “ *One Act*; and operate from the *substantial Part, by Relation*.”

Livery relates to the Feoffment; Inrollment, to the Bargain and Sale; a Recovery, to the Deed which leads the Use: So, Admittance shall relate to the Surrender; especially when it is a Sale for a valuable Consideration, as in this Case.

The Title is not complete till Admittance; And to the Lord it is material, in respect of his Fine: But as between the Parties, the Vendor and Vendee, the Admittance is mere Form. This Agreement is executed, and the Land bound by the Surrender. The Lord is compellable, by *Mandamus* or Decree, to admit. The Vendor, his Widow, his Heir, and all claiming under him, are concluded from saying, after Admittance, “ that the Land did not pass *from the Day* of the Surrender.” Upon this Ground the Lessor of the Plaintiff claims the Inheritance whereof his Brother died seised: It shall not be in his Mouth to say, against the Widow, “ that his Brother did *not* die seised.”

Therefore let Judgment be for the Defendant.

JUDGMENT for the DEFENDANT.

Rex *versus* Ferdinand de Mierre.

Friday, 14th
of June 1771.

THE Defendant stood indicted for refusing to take upon himself the Office of CONSTABLE, being thereunto duly elected. And the Question was, whether he be *eligible* to that Office;

Office; being a *Foreigner*, naturalized by a private Act of Parliament. It came before the Court, upon a special Verdict; and was twice argued; first, on *Saturday 12th November 1770*, by Mr. *John Hyde* (now a Judge at *Calcutta*) *pro Rege*, and Mr. *Davenport pro Defendente*; and again on *Wednesday 6th February 1771*, by Serjeant *Glynn* for the King, and Mr. *Dunning* for the Defendant.

The special Verdict states his Resiency, Election, and Refusal; and then finds that he was born in the *Canton of Berne* in SWITZERLAND, and out of the King's Allegiance; and had lived all his Life-time in foreign Parts and out of the King's Allegiance until 8 Years ago, when he came into *England*, and hath resided in *England* ever since.

That by an Act of Parliament made in the 7th Year of the Reign of our Lord the now King, intituled "An Act for naturalizing *Lewis Agassis, John Samuel Schutze, Philip David Kreuter, Joshua Rougemont, Ferdinand de Mierre, and Christian Godfrey Klein*," It was enacted, that they the said *L. A. I. S. S. P. D. K. I. R. Ferdinand de Mierre, and C. G. K.* should be and were thereby from thenceforth NATURALIZED, and should be adjudged and taken to all Intents and Purposes to be NATURALIZED and as *free-born Subjects* of this Kingdom of *Great Britain*; and they were and should be from thenceforth adjudged reputed and taken to be, in every Condition Respect and Degree, free to all Intents Purposes and Constructions, as if they had been natural-born Subjects within this Kingdom of *Great Britain*. And it was further enacted, that the said *L. A. I. S. S. P. D. K. I. R. Ferdinand de Mierre, and C. G. K.* should be and were thereby enabled and adjudged able, to all Intents Purposes and Constructions whatsoever, to inherit and be inheritable, and to demand challenge ask and retain, have and enjoy all or any Manors Lands Tenements Hereditaments Goods Chattels Debts Estates and all other Privileges and Immunities Benefits and Advantages in Law or Equity belonging to the liege People and natural-born Subjects of this Kingdom; and to make their Resort and Pedigree as Heirs to their Ancestors lineal or collateral, by reason of any Descent Remainder Reverter Right Title Conveyance Legacy or Bequest whatsoever which had might or should from thenceforth descend remain revert accrue or grow due unto them; as also from thenceforth to have retain keep and enjoy all Manors Lands Tenements and Hereditaments which they might or should have by way of Purchase or Gift of any Person or Persons whomsoever; and to prosecute pursue maintain avow justify and defend all and all Manner of Actions Suits and Causes,

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and

and other things to do, as lawfully liberally freely and surely as if they had been born of *British* Parents within this Kingdom, might lawfully in any wise do: And the said *L. A. I. S. S. P. D. K. I. R. F. D. M.* and *C. G. K.* in all things and to all *Intents and Purposes* should be taken to be and should be natural liege Subjects of this Kingdom of *Great Britain*; any Law Act Statute Provision Custom Ordinance or other Matter or Thing whatsoever had made done promulged proclaimed or provided to the contrary in any wise notwithstanding. And it was thereby PROVIDED always and enacted, that the said *L. A. I. S. S. P. D. K. I. R. Ferdinand de Mierre*, and *C. G. K.* should NOT thereby be enabled to be of the Privy Council, or Members of either House of Parliament, or to take any OFFICE or PLACE of TRUST either *civil* or military, or to have any Grant of Lands Tenements or Hereditaments from the Crown to themselves or any other Person or Persons in Trust for them; Any thing therein contained to the contrary thereof in any wise notwithstanding.

But whether, upon the whole Matter aforesaid, by the Jurors aforesaid in Form aforesaid found, the said *Ferdinand de Mierre* was *eligible* or was *duly elected* to the said Office of Constable of the Ward of *Farringdon within*, the Jurors aforesaid are wholly ignorant; and pray the Advice of the Court thereupon.

The Arguments turned chiefly upon the Question whether the Office of Constable was an Office of *Trust*, within the Meaning of the Act of Naturalization, and of the Act of Settlement, 12, 13 *W. 3. c. 2.* and of the Explanatory Act, 1 *G. 1. c. 4.* The Counsel for the Prosecutor argued, that it was not: The Counsel for the Defendant argued that it was. In 25 *C. 2. c. 2.* for preventing Dangers that may happen from Popish Recusants, which mentions "Places of Trust from or under the Crown," there is a Proviso that it shall not extend to the Office of Constable. In 12, 13 *W. 3. c. 2.* it is enacted, that no Person born out of the Kingdoms of *England Scotland or Ireland*, or the Dominion thereunto belonging, although naturalized, (except such as are born of *English* Parents) shall be capable to enjoy any Office of Trust. The 13, 14 *W. 3. c. 6.* recites 1 *Wm. & Mary, c. 2.* and 12, 13 *W. 3. c. 2.* and enacts in the same Words as 25 *C. 2.* as to Places of Trust; and then provides (§ 14.) like 25 *C. 2. § 17.* that this Act shall not extend to Constables. Then comes 1 *G. 1. c. 4.* to explain and amend that of 12, 13 *W. 3.* and after reciting the Clause, and the Doubts that had arisen concerning the Construction of it, enacts that no Person shall be thereafter naturalized, unless there shall be a Clause or particular Words inserted to declare that such Person shall not thereby be enabled

to be of the Privy Council, or a Member of either House of Parliament, or to *take* any Office or Place of Trust, either civil or military &c. Then follows 1 G. 1. c. 13. wherein is a Proviso that it shall not extend to the Office of any Tythingman, Headborough, &c, or any like inferior civil Office.

It was observed, that there was some little Variance in Expression, between the Act of Settlement, and the 1 G. 1. c. 4. and the Act of Naturalization; namely, that the Word "*enjoy*" is used in the former; and the Word "*take*," in the two latter, "*to take* any Office or Place of Trust:" And it was said, that the Word "*enjoy*" imports a Benefit.

It was urged by Mr. *Dunning*, that neither the Spirit of the Law, nor the Arrangement of the Words required that the Office which the naturalized Foreigner is incapacitated to hold, should be a *Grant from the Crown*."

After the second Argument, THE COURT took Time to advise.

And now LORD MANSFIELD delivered their Opinion: which was that as the Office of Constable is clearly a civil Office of Trust; and the Legislature have expressly incapacitated the naturalized Foreigner from taking any civil Office of Trust, generally and without Exception, It is not in the Power of the Court to make an Exception which the Legislature have not, in the present Case, thought fit to make. Therefore the Judgment must be for the Defendant.

JUDGMENT for the DEFENDANT.

Hill and Another *versus* Goodchild.

Monday,
17th June
1771.

THIS was a Writ of Error from the Court of Common Pleas. It was twice argued: First, on *Tuesday* 23d *April* 1771, by Mr. *Morgan* for the Plaintiff in Error, and Mr. *Walker* for the Defendant in Error; and again on *Tuesday* 4th *June* 1771, by Mr. *Wallace* for the Plaintiff in Error, and Mr. *Dunning* for the Defendant in Error. The Roll in C. B. is No 632. The Pleadings were in Substance as follows—Trespass *Vi et Armis* brought in C. B. by *Goodchild* against *Hill* and *Winsey*, for an Assault and Battery. The Defendants plead "Not guilty": And Issue is joined thereupon. The Jury find them guilty; and assess Damages against *Hill*, (besides Costs and Charges), to 40s. And for Costs and Charges 40s. and they assess Damages against *Winsey*,

Winsey, to One Shilling only. And the Judgment is, that the said *Charles Goodchild* do recover against *Hill*, the Damages aforesaid to four Pounds, and also 23*l.* for his Costs *de Incremento*; in all, 27*l.* and that he do recover against *Winsey*, the Damages aforesaid to One Shilling, and also One Shilling for his Costs; in all two Shillings.

The Defendants brought a Writ of Error: And several Errors were assigned; and particularly, that the Jury had given Damages against the Defendants severally and distinctly for one joint Trespass; whereas the Damages ought to have been joint, and not several. And the Court have given Judgment against them to recover several and distinct Damages for one joint Trespass.

Many Cases were cited on both Sides. For the Plaintiff in Error—*Cro. Eliz.* 860. *Austin v. Willward* and two Others. *Cro. Jac.* 384. *Matthews and his Wife v. Cole and Others*, *Cro. Jac.* 118. *Crane & Hill v. Hummerstone*. 3 *Lev.* 324. *Smithson v. Garth and Others*, *Cartbew*, 19, 20. *Rodney v. Strode et al'* 3 *Mod.* 101. S. C. 1 *Stra.* 422. *Onslow v. Orchard*. 2 *Stra.* 910. *Lowfield v. Bancroft et al'*. 11 *Rep.* 5. Sir *John Heydon's* Case, 5th Resolution, fo. 7. *Cro. Car.* 193. *Johns & Robinson v. Dodsworth*. 1 *Wilson* 30. *Sabin v. Long*. *Co. Lit.* 232. *Hob.* 66. and 9 *Co.* 79. b For the Defendant in Error—1 *Bulstrode* 157. *Sampson v. Cranfield and Upton*, in point; and the Reason given, "because the Battery of " the One can't be the Battery of the Other; and the Battery of " the One may be greater than the Battery of the Other." 2 *Stra.* 1140. *Chapman v. House, Slater, & Goodacre*. *Jenkins's Centuries*. 317. pl. 10. *Lane v. Santloe*. 1 *Stra.* 79. which Case shewed, they said, that Sir *John Heydon's* Case was not considered by Lord Ch. J. King, as an Authority. And they called it a confused Case, and of doubtful Authority. It was replied by the Counsel for the Plaintiff in Error, in Answer to this Treatment of Sir *John Heydon's* Case, That there has been no subsequent Determination in Contradiction to it; That the Case of *Player v. Warn and Dewes*, in *Cro. Car.* 54. 55. mentions it without Disapprobation of it; and that it seems to be adopted by the Court, in the Case reported by Serjeant *Wilson*.

THE COURT observed, that there was a very great Confusion in the Cases upon this Subject: Which ought to be carefully looked into, and settled. Some of them are diametrically opposite. And Mr. Justice ASTON added, that some of them were determined upon Principles not agreeable to his Understanding. LORD MANSFIELD observed, that in fact all the Defendants may be guilty; and yet the Degrees of their Guilt may be different: But the present Question is whether upon a Charge of a joint Trespass, the Jury can assess Damages according to different Degrees

grees of Guilt; though the real Justice is, that the Damages should be respectively assessed in Proportion to the real Injury done by each Defendant. This is a Question that is of general Experience, and concerns all the Courts in *Westminster-hall*. It is a strange Thing, that a Matter which happens every Day, should be attended with such Difficulties. Neither Side of the Determination will reconcile the Cases. However, we will consider of it.

CUR' ADVIS.'

And now LORD MANSFIELD delivered their Opinion.

We hold, that as the Trespass is *jointly* charged upon Both Defendants, and the Verdict has found them Both *jointly* guilty, the Jury could not afterwards assess several Damages. His Lordship particularly mentioned the Cases of *Austen v. Wilward*; the 5th Resolution in Sir *John Heydon's* Case; the Case in *Cro. Jac.* 118. of *Crane and Hill v. Hummerstone*; the Case of *Rodney v. Strode*, in *Carthew*, 19. and *Jenkins's Cent.* 317. pl. 10. as warranting this Opinion.

We do not think that the present Case calls for an Opinion upon those Cases where the Defendants *are charged* jointly and severally; or where the Defendants plead severally; or where the Defendants are found guilty of several Parts of the same Trespass or at a different Time; or where a joint Action is brought for two several Trespases, and the Damages found severally, as being severally guilty. We don't meddle with any of these Cases: There is a Variety of Opinions in the Books, relating to them. It is enough for us, to found our present Determination upon the present Case. And the present Case is, that the Count is of a *joint* Trespass; and the Jury have found the Defendants guilty of a *joint* Trespass, and yet have severed the Damages. We are of Opinion, that in *such* Case the Damages *can't be severed*.

The Consequence is, that the Judgment must be reversed.

JUDGMENT REVERSED.

Rex *versus* John Taylor :

and

Elizabeth Smith, Widow, *versus* Eundem.

Tuesday,
18th of June
1771.

THIS Matter first came before the Court on the first Day of *Hilary* Term 1771; when the Defendant was brought up by a *Habeas Corpus*, which issued on the Civil Side: To which the Sheriff of *Surry* returned several Warrants of Commitment and Detainer, for the Murder of *James Smith*; viz. the first, by two Justices of Peace, being the Rotation-Magistrates at *St. Margarets-Hill*; the second, by the Coroner; the third, by an Order of the Court of Gaol-Delivery; and fourthly, upon a Writ of Appeal of Death brought by *Elizabeth Smith*, Widow of the deceased.

The Widow produced and delivered in her Count: Which Mr. *Benton*, the Secondary on the Civil Side, read.

Mr. *Walker*, for the Appellant, prayed that the Defendant might plead.

Mr. *Wallace*, for the Defendant, prayed *Oyer* of the Writ.

Mr. *Benton* read the Writ and Return.

Mr. *Wallace* moved for a Special Imparlance, in order to plead the Special Verdict which had been found: He said, He thought it would not be opposed.

It was not opposed: And he had an Imparlance to the last Return of that *Hilary* Term, granted him by the Court.

Mr. *Dunning*, for the Appellant, prayed that She might prosecute by Attorney.

This was neither objected to, nor consented to.

Mr. *Dunning* said, He claimed it as a *Right*.

LORD MANSFIELD—Be it so.

The Appellant then put in a Warrant of Attorney, authorizing *Robert Crispin* to prosecute for Her.

LORD MANSFIELD—Is there any thing further asked? Nothing further being proposed on either Side—

LORD MANSFIELD—Let him be committed to the Custody of the Marshal.

He was accordingly committed to the Custody of the Marshal.

On *Wednesday 6th February 1771*, The Attorney for the Prosecution of the Indictment, having had Notice and also a Copy of the Special Verdict, did not, and had declared that he should not, employ any Counsel to argue the Special Verdict; nor did he at all appear in Court: And Mr. *Dunning*, who was Counsel for the Widow upon the Appeal, declaring “that He would not undertake to argue it; it proceeded *ex parte*.”

The Special Verdict was as follows—

And the Jurors &c. do say upon their Oath, That on the 8th day of *September* last, the abovenamed *John Taylor*, then and yet being a Serjeant in the first Regiment of our said Lord the King of Foot, was in a Taphouse or Alehouse situate in the Parish of *Lambeth* in the said County of *Surry*, then rented by *Jonathan Sabine*, of *James Smith* the Deceased in the said Indictment named; And that the said *James Smith* had nothing to do with the Sale of the Beer in the said Taphouse or Alehouse so rented by the said *Jonathan Sabine* of the said *James Smith* deceased as aforesaid; and that the said *John Taylor* was then drinking with another Soldier and a Gardener, being all three *Scotchmen*, in a Room of the said Taphouse or Alehouse; and *James Edwards* and — *Pepper*, Servants to the said *James Smith*, were then likewise drinking, in an opposite Box in the same Room: And the said *James Edwards*, without any Provocation given by the said *John Taylor* or any of his Company, then said of the said *John Taylor* and his Company, “They were Lord *Bute’s* Country-men.” And the said Jurors, on their said Oath, further say, That the said *John Taylor* thereupon said to the said *James Edwards*, “Do you know any Harm of them?” To which, the said *James Edwards* or One of his Company answered, “No; nor any Good.” The said *John Taylor* thereupon replied, “Yes: In the last War, they did great Service to their Country, by fighting the Savages in *America*.” The said *James Edwards* then said, “It was fit, One Savage should fight against another.” Whereupon the said *John Taylor* struck the said *James Edwards* with a small Rattan-Cane not bigger than a Man’s

Man's little Finger : And the said Gardener, then in Company with the said *John Taylor*, struck the said *James Edwards* with his Fist. Whereupon, the said *James Edwards* went out of the said Room into the Yard, to fetch his Fellow-Servants, to turn the said *John Taylor* and his Company out of the said Room. And then the said *Jonathan Sabine* bid the said *John Taylor* pay for his Liquor, and be gone; as he did not like to have such a Noise in his House. But the said *John Taylor* said, "He would not pay nor go, directly." And the said Jurors, on their said Oath, further say, That while the said *James Edwards* was out of the said Room, the said *James Smith* came into the said Room, and said "What is the Matter?" and insisted that the said *John Taylor* should pay for his Liquor and go out of the House. The said *John Taylor* then said to the said *James Smith*, "Are you Master of the House?" The said *James Smith* answered, "No, *You Rascal*; But I am Owner;" and further said, "Because you have red Coats on, you think you have a Right to come into any Man's House, and do what you will." The said *John Taylor* was then going away: But the said *James Smith* laid hold of Him the said *John Taylor* by the Collar, and said "He should not go away till he had paid for the Liquor;" and then threw the said *John Taylor* down against a Settle. The said *John Taylor* then paid for the Liquor. Whereupon, the said *James Smith* laid hold of the said *John Taylor*, AGAIN, by the Collar, and SHOVED Him out of the said Room into the Passage of the said Taphouse or Alehouse. The said *John Taylor* then said, "that He did not mind killing an Englishman, more than eating a Mess of Crowdy." And the Jurors aforesaid, upon their Oath aforesaid, further say, that after the said *James Smith* had pushed the said *John Taylor* into the said Passage, the said *James Edwards* came and ASSISTED the said *James Smith*, who had then hold of the said *John Taylor*'s Collar: And the said *James Smith* and *James Edwards* together VIOLENTLY PUSHED the said *John Taylor* out of the said Door of the said Taphouse or Alehouse. Whereupon, the said *John Taylor* instantly turned round, drew his Sword, and STABBED the said *James Smith*, and gave him the mortal Wound laid in the Indictment; of which, he languished until the 9th day of December, and then died. And the said Jurors, on their said Oath further say, that the said *Jonathan Sabine* did Nothing towards turning the said *John Taylor* out of the said Taphouse or Alehouse.

But whether, upon the whole Matter aforesaid, the said *John Taylor* be guilty of the Felony and Murder in the said Indictment specified and charged upon Him, the said Jurors are altogether ignorant, and pray the Advice of the Court here thereupon. And if, upon the whole Matter aforesaid, it shall appear

to the Court, "that he is guilty of the Felony and Murder &c, then they find Him guilty &c: If, upon the whole Matter &c, it shall appear to the Court, "that He is *not* guilty of the Murder aforesaid charged upon Him by the said Indictment, then the said Jurors, upon their Oath aforesaid, do say, "that the "said John Taylor is *not* guilty of the Murder aforesaid, as the "said John Taylor hath for Himself above in pleading al-
 "ledged; But that the said John Taylor is only guilty of *felo-
 "nicusly killing and slaying the said James Smith.*

Mr. Lucas, on Behalf of the Defendant, argued that this was only Manlaughter. He cited *Foster's Crown-Law*, 926. and 1 *H. H. P. C.* 455, 456. Lord Morley's Case. *Foster* 290, 295. *Kelynge* 135. *Queen v. Mawgridge*. *Kelynge* 51. *Ford's Case*. *Foster* 278. *Maylor's Case*. *Style* 467. *Bucknall's Case* (mentioned in *Mawgridge's Case*.)

He was remanded, and ordered to be brought up again on *Friday* next.

On which *Friday*, 8th *February*, 1771,

LORD MANSFIELD declared, in the Name of the Court, That they had All looked very carefully into the Books and Cases upon this Subject; and were of Opinion "that this Finding can only amount to MANSLAUGHTER."

It is settled, that *Words* are not a sufficient Provocation: But *Blows* are a Provocation sufficient to lessen the Crime into Manlaughter.

The Statute of Stabbing, which is declaratory of the Common Law, takes away Clergy for Stabbing a Person "not having first "struck."

Here, the first Provocation was in Words: And *Taylor's* first Answer to them had no Harm in it, nor his Reply. Then more abusive Words were given him, without Provocation on his Part. Then *Taylor* struck *Edwards* who had given him these abusive Words, with a small Rattan Cane. After this, they wanted to turn *Taylor* out of the House. Then a third Set of abusive Words were used to him by the unfortunate Man killed; Who, being asked by *Taylor* "if he was Master of the House," answered "No, you Rascal;" and when *Taylor* was going away, laid hold of him by the Collar, and afterwards threw him down against a Settle. Then there was a third Assault made by the Deceased upon *Taylor*, (for the first was double,) or at least a second, be-
 I fore

fore *Taylor* made use of any abusive Language whatsoever. After this, the Deceased and *Edwards*, Both of them, violently pushed *Taylor* out of the Door of the Alehouse. Whereupon he instantly drew his Sword and stabbed *Smith*, the Deceased, and gave him the mortal Wound. This Case, therefore, is stronger than many of the Cases where it has been determined to be only Manlaughter. It can not amount higher than to Manlaughter.

WHEREUPON, the Prisoner being asked by Mr. *Barlow*, the Secondary of the Crown-Office, "What he had to say for himself, why the Court should not proceed to give Judgment and award Execution against him according to Law," He fell on his Knees, (being directed so to do, as is usual,) and prayed the Benefit of his Clergy :* Which was allowed to him.

* V. 18 Eliz.
c. 7. f. 3.

Mr. Justice *Aston* (as second Judge of the Court) pronounced the Sentence, "that, having been convicted of Manlaughter, he should be burnt in the Hand."

LORD MANSFIELD asked Mr. *Benton*, Senior, who remembered the Case of † *Rex v. Reason & Tranter*, which was in *Hil. 8 G. 1. 1721*. "where the Sentence in that Case was executed." Mr. *Benton* answered—"Behind the Bar."

† v. 1 Stra.
499. 502.

Whereupon, the present Defendant *John Taylor* was accordingly removed backwards in a strait Line from the Bar, but in the Face of the Court, (the Doors of the Inclosure still remaining open), and ‡ burnt in the Hand, by One of the Marshal's People, who was prepared for that Purpose. For, as the Defendant came up in Custody of the Marshal, He was the proper Person to execute (by Himself or some One appointed by Him) the Sentence of the Court. So, in the Case of the two *Atboes*, Father and Son, *Trin. 9 G. 1.* (which I remember, and which is reported by Sir *John Strange* in his 1st Volume, page 553,) the Defendants, being in the Custody of the Marshal, were executed at *St. Thomas a Waterings* near the End of *Kent-Street*, being the usual Place of Execution for his Prisoners. See also the Rule-Book in the Crown-Office, of *Monday* next after five Weeks of *Easter 7 G. 3. Rex v. Royce*, "Ordered that the Marshal do execute him."

‡ v. 1 Stra.
502. Reason
and Tranter's
Case.

The Defendant was remanded.

Mr. *Walker*, for the Appellant, moved that he might be brought up again To-morrow, to plead to the Appeal.

Ordered accordingly.

Mr. Cox, for the Defendant, made the like Motion, on Monday the 11th that he might be brought up on the then next Day (the 12th) to plead to the Appeal: And it was Ordered that he should.

Note—The Cause now takes the Name of

SMITH, Widow, *versus* TAYLOR.

ON Tuesday, the 12th, he was brought up, and stood in Court, on that Side of it where Criminal Defendants usually stand; his being brought down to the Bar being dispensed with, by Consent.

He pleaded, in Bar to the Action, a Conviction of Manslaughter, and Judgment thereupon "to be burnt in the Hand;" and that he had been thereupon actually burnt in the Hand accordingly: And then he pleaded over, to the Felony and Murder, "Not guilty."

It was agreed, that this should be the *Substance* of his Plea; and that it should be afterwards drawn up and delivered in Form, within a Fortnight; but to be entered as of this Day.

Note—That in a Case not unlike the present, * *Loder v. Snowden*, p. 4 *W. & M.* 1692. B. R. the Appellant appeared on the *quarto Die post*: And in a subsequent Case of *Tucker v. Mackerson*, reported by Serjeant *Barnardiston*, Vol. 1. pa. 423. and of which I also have a Note, in *Hil.* 1730, 4 G. 2. Mr. Justice Lee said "that the Appellant has to the *quarto Die post*;" and he cited the Case of *Loder v. Snowden*.

THE COURT adjourned the Appeal till next Term.

(The Effoin-day of the next Term is the proper Day; being by Original Writ.)

The Plea, which was afterwards drawn up and delivered in Form, was as follows—

The Defendant set out the whole Proceedings in the Indictment against Him, and the Special Verdict, and the Determination of the Court upon it, "that he was not guilty of Murder, but only of feloniously killing and slaying the said *James Smith*;" and being immediately asked by the Court there "if

“ he had any Thing to say why the Court should not proceed to
“ give Judgment and award Execution against Him thereupon,”
He then and there [This was *Monday* after the Purification, in
Hilary Term 1771, 11 Geo. 3.] prayed the Benefit of the Statute;
and it was allowed Him; And thereupon the Court adjudged
“ that he, for the Felony and Murder aforesaid, should be *burnt*
“ *in the left Hand* ;” and he was then and there *burnt in the left*
Hand accordingly; as by the Record &c. Wherefore he prays
Judgment, if the said *Elizabeth Smith* ought to have or main-
tain her said Appeal against Him. He then avers his Identity,
and also that it was the same *James Smith*, and the same mortal
Wound. Then he prays Allowance of the Premises; and pleads
“ Not guilty” as to the Felony and Murder.

The Appellant replies, that she ought not to be barred of her
Appeal by any Thing alledged in this Plea, because, protesting
and not acknowledging any such Record as the said *John Taylor*
hath above pleaded in Bar of the Appeal aforesaid, For Plea She
says “ That *long before* the giving of the said supposed Judgment
“ in the said Plea mentioned, she the said *Elizabeth* sued out her
“ *Original Writ of Appeal* against the said *John Taylor*.” And
this she is ready to verify. Wherefore she prays Judgment and
Execution against the said *John Taylor*, for the Premises afore-
said. *Taylor* demurs generally to this Replication: And the
Appellant joins in Demurrer.

On *Tuesday* 18th *June*, 1771, this Demurrer was argued, by Ser-
jeant *Leigh*, for the Defendant; and Mr. *Davenport* for the Ap-
pellant, (Serjeant *Glynn*, who was to have argued for Her, not
being well enough to come down to *Westminster-Hall*.)

Serjeant *Leigh* said, it was now settled, that this is a Bar:
And, as it is in *Favorem Vitæ*, the Court will not overturn it.
He cited the following Cases.

Thomas Wigges's Case, 4 Co. 45.^b 47. which shews that it is
a good Bar; even though the Appeal were antecedent to the
Conviction. And this Case of *Wrotb v. Wigges* is cited and ac-
knowledged in the Case of *Harvey v. Reynell*, Sir *Wm. Jones*
145. “ A Conviction upon Indictment, pending the Appeal,
“ before the Plea pleaded, may be pleaded in Bar.”

And not only “ *Auterfoits* convict of Manlaughter, and
“ Clergy thereupon allowed,” is a good Bar in an Appeal of
Murder; but even where a Person is indicted before the Coroner,
of Manlaughter; and arraigned upon that Indictment, before
Com-

Commissioners of *Oyer and Terminer*; and confesses the Indictment, and prays his Clergy; and thereupon a *Curia advisare vult* is entered; the whole Court held "that the Matter of the Bar had been a good Bar of the Appeal by the Common Law, as well as if the Clergy had been allowed: For that the Defendant, upon his Confession of the Indictment, had prayed his Clergy, which the Court ought to have granted; and the Deferring of the Court, to be advised, ought not to prejudice the Party defendant, albeit the Appeal was commenced before the Allowance of it." This was determined in the Case of *Thomas Burgh* Esq; Brother and Heir of *Henry Burgh* Esq; (Sons of *William Lord Burgh*;) upon an Appeal of Murder brought against *Thomas Holcroft* Esq; of the Death of the said *Henry Burgh*, eldest Brother of *Thomas Burgh* the Appellant. See 3 *Inst.* 131. c. 57. "of Appeals." See also 4 *Rep.* 45. ^b S. C. cited; 2 *Leon.* 83. 160. S. C. and 1 *Anderfon* 68. S. C. and *Coke's Entries* 53 to 56. pl. 4. S. C. where the special Verdict is preserved, together with the whole Record, a very curious One, and well worth Reading. It is of 20 or 21 *Eliz.* 1578 or 1579. A Guardian was assigned to the Infant Appellant, by the Court. An Indictment and Trial within the Verge was pleaded in Bar of the Appeal. The Person killed is there called *Henry Borowe* al'. *Burgh*. His Brother *Thomas*, the Appellant, though under Age when he first brought the Appeal, came to full Age whilst it was depending. His Father was then living: Upon whose Death (in *September* 1584) he became Lord *Burgh*, and was afterwards made a Knight of the Garter, and died Lord Deputy of *Ireland*, in *October* 1597.

In the case of *Armstrong v. Lisle*, *Kelyng* 89 to 108. (particularly pa. 94.) it was settled "that the Defendant being convicted of Manslaughter, and allowed the Benefit of Clergy, and reading as a Clerk, did bar the Appellant of his Appeal of Murder." This was resolved by the whole Court, in that Case: Which condemns the Doctrine advanced in *James* the second's Time, "that the Court might delay the calling the Convict to Judgment, to hinder him from praying his Clergy; especially, if any Appeal were depending before it was allowed; in order to make the Defendant liable to the Appeal." One of the Cases that had been so resolved was the Case of *Goring & Deering*. See *Kelyng* 106. In the Case of *Armstrong v. Lisle*, the Defendant demanded the Benefit of his Clergy, before the Appeal was arraigned: And when the Bill of Appeal was read, *Lisle* appeared to it, and prayed to be bailed; but refused to plead. He had a Right to the Judgment of Manslaughter, as soon as he was convicted of it.

He

He finished his Citations, with *Hawkins's P. C. Lib. 2. c. 36.* § 13, 17. *pa.* 378, 379. And concluded with saying that a man shall not be twice punished for the same Offence.

Mr. *Davenport*, for the Appellant, endeavoured to shew that the present Case was distinguishable from the Cases cited by the Serjeant. He cited some Statutes, and a Case in 1 *Anderson* 114. Case 158. But he chiefly relied upon the Case of *Goring v. Deering*, reported in 3 *Mod.* 156. which was an Appeal for the Murder of *Henry Goring Esq*; brought by his Widow. The Defendant pleaded that he was indicted for the same Murder at the Sessions-house in the *Old Bailey* in *Middlesex*; that he was found guilty of Manslaughter, and not of Murder, *prout patet per Recordum*; that he was *Clericus*, *et paratus fuit legere ut Clericus*, if the Court would have admitted him; and that he is the same Person &c. To this Plea the Appellant demurred. The Fact was, that the Appeal was brought after Conviction, and before Sentence. Eleven Judges (all, except *Street*,) assembled at *Serjeant's Inn* upon this Occasion: And the Chief Justice delivered their Opinion that "this was *no* good Plea; and that the Court ought not to ask the Prisoner what he had to say, and so let him into the Benefit of his Clergy."

He observed, that in the Case now before the Court, the Defendant was not intitled to the Benefit of Clergy, at the Time when he was arraigned upon the Appeal: Whereas, in the Case last cited, the Defendant had been convicted of Manslaughter, before the Appeal was brought.

Serjeant *Leigh*, in his Reply, said it would be a most unreasonable Thing, and even shocking to think of, that a Man's Life should be risked by the Court's taking Time to advise.

LORD MANSFIELD and the whole COURT were of Opinion, that this Point had been considered as settled, since the Case of *Armstrong v. Lisle*. And Mr. Justice ASTON observed that even the Case of *Goring v. Deering* does not controvert but that if the Defendant *had had* his Clergy, that would have been a good Bar to the Appeal. He approved of Serjeant *Hawkins's* Reasoning in the 14th Section of the 36th Chapter of his second Book: And he thought that the Court, who were said to be of Counsel for the Defendant, ought to ask the Prisoner if he had any thing to say &c.

PER CUR' unanimously,

JUDGMENT for the DEFENDANT;
and RULE to discharge him.

I had two Reasons for inserting this Case. One of them was, to preserve *historically*, by giving the Special Verdict at large, the *precise Circumstances* of the Fact; which are not unlikely to be misunderstood or misrepresented, as many Persons were much prejudiced against this *Scotch* Serjeant, partly on Account of his Nation, and partly from the very improper Declaration he had made, at the very Time of killing the Deceased, "that he did not mind killing an *Englishman*, more " than eating a Mefs of Crowdy." My other Reason is what I have hinted before, in pa. 2643, to keep in Memory, both for Curiosity and Precedent, the Form and Method of this uncommon Species of Proceeding.

Friday 14th
June, 1771.

Earl of March *versus* Pigot.

A Verdict having been found for the Plaintiff, Mr. Lee moved on behalf of the Defendant, for a new Trial.

The Cause was tried before Lord *Mansfield*. It was a Contract made at Newmarket. The Wager was originally proposed between young Mr. *Pigot*, the present Defendant, and young Mr. *Codrington*, to run their Fathers (to use the Phrase of that Place,) Each against the Other. Sir *William Codrington*, the Father of Mr. *Codrington*, was then a little turned of fifty: Mr. *Pigot's* Father was upwards of seventy. Lord *Offory* computed the Chances, according to the abovementioned Ages of their respective Fathers. Mr. *Codrington* thought the Computation was made too much in his Distavour. Whereupon Lord *March* agreed to stand in Mr. *Codrington's* Place: And reciprocal Notes were accordingly given between the Earl and Mr. *Pigot*. Mr. *Pigot's* Note run thus—"I promise to pay to the Earl of " *March* 500 Guineas, if my Father dies before Sir *William Cod-* " *rington. William Pigot.*" The Earl's was—"I promise to " pay to Mr. *Pigot* 1600 Guineas, in case Sir *William Cod-* " *rington* does not survive Mr. *Pigot's* Father. *March.*" No Mention was at all made, at the Time of this Transaction, about their Fathers being *then* dead or alive. But the Fact was, that Mr. *Pigot's* Father was then actually dead: He died in *Shropshire*, 150 Miles from *London*, at two oClock in the Morning of the same Day on which this Bet was made at Newmarket, after Dinner. However, this Fact was not, at that Time, at all known to any of the Parties; nor was there any Reason for suspecting that Mr. *Pigot's* Father was then dead. There was no Objection made at the Trial, against going into Parol Evidence. Lord

Mansfield left the Matter to the Jury; who found a Verdict for the Plaintiff, with 525*l.* Damages.

The Objection was, That the *Contract* was void. It was without any *Consideration*: For, there was no Possibility of the Defendant's *Winning*, (his Father being then actually dead;) and therefore he ought not to *lose*. It was a Contract *in futuro*, manifestly made upon the Supposition of a *then future* Contingency. The Meaning can't be doubted: And the Words sufficiently express that Meaning. "If my Father dies before Sir *William Codrington*" is equivalent to saying, "If my Father *shall* die before Sir *William Codrington*. But his Father was dead before he entered into this Contract.

Mr. *Lee* said, it was given in Evidence, and is certainly true, that their Fathers being dead or being alive made no Difference in the Proportion of the Value of the Chance: And he observed, that in the Case of an Insurance upon a Ship, if the Words "lost or not lost" be not inserted; and the Fact should happen to be, that the Ship was actually lost at the Time when the Insurance was made; the Insurance is void.

RULE to shew Cause why there should not be a New Trial.

And now Mr. *Wallace*, Mr. *Dunning*, and Mr. *Mansfield*, on behalf of the Plaintiff, shewed Cause against a New Trial being granted.

They said that the Insertion of the Words "lost or not lost" was peculiar to *English* Policies: It is not inserted in the Policies of *other* Nations. *Roccus* fo. 205. No. 175. And the Reason there given (at the End of it,) namely, "that the Fact being *unknown* will not prejudice the Insurance," applies to the present Case.

Supposing it to have related to the Death of Persons in *India*, or the Safety of the *Aurora*, can any one imagine that the Insurance would be void because the Event had happened antecedent to the making of the Contract?

The Event of Either of the two Fathers being then already dead did not occur to the Parties: If it had, it would not have varied the Bet. The two reciprocal Notes undoubtedly mean One and the same Event. Retrospect is included, as well as Futurity.

Mr.

Mr. *Lee* and Mr. *Bolton*, for the Defendant, replied, that by the Law of *England* it is necessary to insert the Words "lost or not lost," in Ship-Policies: Otherwise the Insurance is void, if the Ship was then already lost. And this, they said, was expressly laid down by *Molloy*.

The Bet went upon the Idea that Both Fathers were then living: And so the Evidence agreed. The Bet was clearly future. If a Bet be laid upon two Horses; and One is dead at the time; it is no Bet.

The Case of the *Mills Frigate* was an Insurance upon a Ship which had a latent Defect totally unknown to the Parties: And the Insurers were holden not liable, upon Account of the Ship's being *not Sea-worthy*, though such Defect was *not known*.

LORD MANSFIELD—I differ totally in Opinion from that Doctrine. The Determination in that Case, (which was made by my Lord Chief Justice *Wilmot* and me, to whom it was referred,) was made quite upon another Ground: And the Change of Opinion in the Court of Common Pleas happened upon the citing of two Cases that had been determined before me; which Cases were mistaken. The Insured ought to know whether his Ship was Sea-worthy or not, at the time when She *set out* upon her Voyage: But how should he know the Condition She might be in, after She had been out a Twelvemonth?

If the present Case had stood upon written Evidence only, it had been Matter of Law. But there was no Objection made, at the Trial, against going into Parol Evidence.

The Question is, "What the Parties really meant"? The material Contingency was—"Which of these two young Heirs should come to his Father's Estate, first"? It was not known that the Father of Either of them was then dead. Their Lives, their Healths, were neither warranted nor excepted. It was equal to Both of them, Whether one of their Fathers should be then sick or dead. All the Circumstances shew, that if it had been then thought of, it would not have made any Difference in the Bet; and there was no Reason to presume that they would have excepted it.

The Intention was, that he who came first to his Estate should pay this Sum of Money to the other who stood in need of it. That the Event *had* happened, was in the Contemplation of neither Party.

Both

Both Notes are so penned, as to be applied to what was *to happen*. But the Nature of such a Contract, and the manifest Intention of the Parties, support the Verdict of the Jury, (tow hom it was left without Objection,) “that he who succeeded to his “Estate first, by the Death of his Father, should pay to the “Other,” without any Distinction whether the Event had or had not, at that Time, actually happened.

Mr. Justice ASTON—It was originally intended to be a Bet between two young Heirs apparent: And the material Point to be settled was to fix the Difference of the Chances of the Survivorship of their Fathers. The mere Survivorship was the Thing intended to be betted upon. The Jury were the proper Judges of the Intention of the Bet: And they have determined *what* that Intention was. *If* it had stood singly upon the Defendant's *Note*, I should have thought it *Not* to be a good Promise at the Time of giving it. But taking the Evidence and all the Circumstances *together*, it was proper to be left to the Jury: And the Jury, taking the Circumstances into Consideration, (and it was proper to take them into Consideration,) have determined it. I see no Ground for granting a New Trial.

THE OTHER two Judges Concurred:

And THE COURT unanimously DISCHARGED the
RULE for a NEW TRIAL.

The End of *Trinity* Term 11 G. 3. 1771.

Michaelmas Term

12 Geo. 3. B. R. 1771.

Rudsdell *versus* Rudsdell.

Saturday, 9th
November
1771.

This was a Case out of Chancery, for the Opinion of this Court, on a Will.

IT was a very long Case: but it may admit of some Abridgement. The Substance of it was—That *Jonathan Rudsdell*, seized in Fee of a Freehold Estate of the Value of 103 *l. per Annum*, soon after his Marriage made a Settlement by Deed Poll dated 30th *January* 1744. whereby, in Consideration of the Marriage lately had between him and his Wife, and of natural Love and Affection for Her, and for making some Provision from and after his Death for Her and such younger Sons and such Daughters as he might have by Her, he grants to *Benjamin Collyer* an Annuity of 50 *l.* issuing out of particular Lands and Tenements, To hold to the said *Benjamin Collyer* his Heirs and Assigns, to the Use of his Wife *Mary Rudsdell* and her Assigns for her Life; and, after her Decease, to the Use of All and Every of his Children on the Body of his said Wife lawfully begotten or to be begotten, (Other than an Eldest or Only Son,) as Tenants in common, and not as Joint-tenants, and their Heirs and Assigns severally for ever; And for default of such Children, to the Use of his right Heirs, for ever. A Clause of Distress is here inserted; and also a Proviso, that if at any Time, after the Decease of Him and his Wife, his Eldest or only Son by his said Wife, or his Heirs or Assigns, should be willing to pay to All or any Other of his Children by Her, or the Heirs or them or any of them, being of the Age of 21 Years or upwards, for and in Satisfaction and Discharge of the said Annuity or yearly Rent-Charge, or his or their Part or Parts thereof respectively, so much lawful

lawful Money of *Great Britain* as the same shall amount unto at or after the Rate of 25 Years Purchase, then such Monies shall and may be paid, and shall be taken and accepted accordingly; and from and after such Payment thereof, the said Annuity or yearly Rent-Charge, or so much thereof as shall be so bought off or paid for, shall cease and determine; and the same shall be given up released and discharged by the Person or Persons receiving such Monies to the Person or Persons paying the same, at his or their Request and Charge, by such Ways and Means as he or they shall reasonably require.

On the 20th *July*, 1754, the said *Jonathan Rudsdell*, having then Issue by the said *Mary* his Wife only One Child, a Daughter, named *Susannab*, who was born in *May* 1748, made his Will, as follows—* *Item*—Whereas after my Intermarriage with my loving Wife *Mary Rudsdell*, I entered into certain Articles and Covenants to leave unto Her the yearly Income of fifty Pounds *per Annum*. to be paid to her yearly out my real Estate during her Natural Life, in case I should happen to die before Her; and, after her Decease, to leave it, if I had more than One Child, to the youngest Child, if only two were living at her Decease; but if I left more than two Children, at my Death, of her Body lawfully begotten, then the said 50 *l. per Annum* to be equally divided amongst all such younger Children as shall survive their Mother my loving Wife *Mary Rudsdell*, Share and Share alike, the said 50 *l. per Annum* to be paid out of my real Estate; Now my Mind and Will is, and I the said *Jonathan Rudsdell* make it my earnest Request to my loving Wife *Mary Rudsdell*, (as it will be much to her Advantage,) That, instead of the aforesaid 50 *l. per Annum*, She the said *Mary Rudsdell* would, for her natural Life, accept of One full Half or Moiety of the yearly Income of all my Messuages Lands and Tenements situate lying and being in the Town of *Kingston upon Hull* and in *Beverley* in the County of *York*, and in *Tealby alias Tealby Thorpe* and in *Gainsburgh*, all in the County of *Lincoln*, or within the Kingdom of *Great Britain*; and also One Half of the yearly Income of all my Personal Estate and Monies whatsoever, when my Debts Legacies and Funeral Expences are discharged. And my Will further is, And I do hereby give to my dear Daughter *Susannab Rudsdell* the other full Half or Moiety of the yearly Income of all my Estate both real and personal, during the Life of her dear Mother my loving Wife *Mary Rudsdell*; My Debts Legacies and Funeral Expences, as before mentioned, being first discharged. But provided I leave my Wife with Child, and have a Child born after my Decease that shall live, my Will is, if it be a Son, as the Paddock is entailed upon the Male Heir, that, during his Minority, his Education and Board

* Note. I have not transcribed the Words of mere Form, nor foreign Clauses.

Board be paid for out of the Income of the Paddock Estate. But at the Decease of his dear Mother, if He survive Her, he shall during his Minority be intitled to One full Half or Moiety of the yearly Income of my real and personal Estate, and no more. My Meaning is, that the 50*l. per Annum* which by the Marriage Writings he may have a Claim to, as the youngest Child, after the Decease of his dear Mother, shall only be made up One Half of my real and personal Estate; and that, after the Decease of my dear Wife *Mary Rudsdell*, my dear Daughter *Susannab Rudsdell* shall enjoy the full Half or Moiety of the yearly Income of my real and personal Estate as abovementioned, and likewise the Half of the real and personal Estate itself, when She attains the Age of 21 Years, or on the Day of Marriage, which shall first happen. Item, my Mind and Will likewise is, that if my dear Wife *Mary Rudsdell* be left with Child by me of a Daughter, That, during the Natural Life of my dear Wife *Mary Rudsdell*, the said Daughter shall have an equal Share with her Sister my dear Daughter *Susannab Rudsdell*, of the One Half or Moiety of the yearly Income of both my real and personal Estate: But at the Death of their dear Mother, my dear Daughter *Susannab Rudsdell* shall then have One full Half of the real and personal Estate; and the said other Daughter (if She be living at the Decease of my said loving Wife *Mary Rudsdell*) shall have the Other full Half of my real and personal Estate. But if Either of the said Daughters should, before the Age of 21 Years or Marriage, happen to die, the Survivor shall have the Other's Part or Share of my said real and personal Estate. But provided my said dear Wife *Mary Rudsdell* be *not left with Child* by me at my Decease, I then give and bequeath unto my dear Daughter *Susannab Rudsdell*, if she outlives her said Mother *Mary Rudsdell*, the *Whole* of my real and personal Estate, *at her Mother's Death*, for her to dispose of as She pleases, when She arrives at the Age of 21 Years. But if my said Daughter *Susannab Rudsdell* die before She attain the Age of 21 Years and unmarried, then my Will is, that my loving Wife *Mary Rudsdell*, if She outlives her said Daughter, and have no other Child, living, of her Body by me lawfully begotten, shall during her natural Life have the Income of the Whole of my real Estate, or (in other Words) what it yearly brings in. And I likewise give Her, my said Wife *Mary Rudsdell*, in case of my said Daughter *Susannab Rudsdell's* Death under Age and unmarried, and my leaving no other Child nor my Wife with Child by me, All my personal Estate whatsoever, for her own Use and Benefit, and likewise to dispose of as She pleases. And I leave to Her my said loving Wife *Mary Rudsdell*, for her Use during her natural Life, all my Plate, Linnen, Household Goods and Furniture, and all my Books: and in case of my Daughter *Susannab Rudsdell's*

Rudsdell's Departure before Her, and my leaving no other Child, my said Wife *Mary Rudsdell*, shall have the Sole Use and Disposal of the said Plate, Linnen, Household Goods and Furniture, to do as She hath a Mind with. *Item*, if my dear Daughter *Susannah Rudsdell*, die before Marriage or attaining the Age of 21 Years, and my having no other Child then living, and my loving Wife *Mary Rudsdell* being dead also; but not during the Natural Lives of either my Wife or Daughter, or any other Child, (Son or Daughter) that I may happen to leave, of the Body of my said Wife *Mary Rudsdell* by me lawfully begotten; I do then leave to my Brother *John Rudsdell*, &c. &c. The Will proceeds with many Devises over, in case of this Event; and many minute and particular Bequests and Dispositions, which do not affect the Question under present Consideration. He makes his Wife Sole Executrix; and appoints Her to have the Guardianship of his Children.

The Case states, that after the making this Will, the said *Jonathan Rudsdell* had three more Children, by his said Wife *Mary*; viz. *Mary*, born in *August 1755*; *Jonathan*, in *September 1757*; and *Benjamin*, in *March 1760*. The Testator *Jonathan Rudsdell*, survived his said Wife; and died in the Beginning of the Year 1768, leaving his four Children before named.

He was then seised in Fee Simple of all the Estates comprized in the Deed Poll of the 30th of *January 1744*, (except the Tenements in *Lord's Street Gainsborough*, and in *Hull*, which he sold:) which are of the Yearly Value of 103 *l.* whereof about 43 *l.* is Land, and 60 *l.* in Houses. He was also seised for Life, Remainder in Tail, of the Estate in the Will called the Paddock, worth about 55 *l.* a Year. He left a very small personal Estate, if any, after Payment of his Debts; and no other Property whatsoever. *Susannah*, the eldest Daughter, after the Death of her Father, (in *May 1768*,) attained her Age of 21 Years.

In *Easter Term 1769*, *Jonathan Rudsdell*, the Eldest Son of the Testator, born after the Will, brought his Bill in the Court of Chancery, by his next Friend, against the said *Susannah* the Daughter born before the Making of the Will, and *Mary* and *Benjamin*, the two younger Children, and *Coats* the personal Representative of the Father, (*Brooks* not acting.)

The Bill states, that the Father, at the Time of making his Will, had only one Child, the Defendant *Susannah*; and that the Plaintiff, and the Defendants *Mary* and *Benjamin Rudsdell*, being all born afterwards, made such an Alteration in the Circumstances of his Family, as ought to be deemed a Revocation

of his Will. That it appeared from the Will, that the Testator intended only to dispose of his real personal Estate upon the Contingencies therein mentioned; and that none of such Contingencies, and upon which alone the Disposition thereby made was intended to take Place, ever happened: And therefore either the said Will shall be considered as revoked by such Alteration of Circumstances; or that the said *Jonathan Rudsdell* ought to be considered as having died Intestate, Such Will having been intended to take Effect only upon Events which never happened. And the Bill prayed that the said Will might be revoked or set aside, for the Reasons aforesaid; That the Defendant *Susannah Rudsdell* might be decreed to deliver Possession of the real Estates to the Plaintiff, with the Deeds, and account for the Profits; and for an Account and Division of the personal Estate according to the Statute of Distributions; and for general Relief.

All the Defendants put in their Answers. *Susannah Rudsdell* insisted that the said *Jonathan Rudsdell* her Father did by his said Will, upon the Contingency of his Wife *Mary's* not being left with Child at his Death, give All his real and personal Estate to her the Defendant, if She should outlive her Mother, at her Mother's Death, to dispose of as She pleased, when She arrived at 21. That the Testator died without leaving his Wife with Child at his Death: And therefore, as She the Defendant *Susannah* not only survived her Mother, but had attained 21, She insisted that by virtue of the said Will She was intitled to All the said Testator's real and personal Estate. Believed it was the Intention of the Testator at the Time of making his Will, that the Disposition thereby made of his Estates should take Effect upon some or one of the Contingencies therein mentioned happening. That three of these Contingencies did really happen; viz. 1st. The said Testator did not leave the said *Mary* his Wife with Child, at his Death; 2d. That She the Defendant *Susannah*, had outlived her Mother; and 3d. That She had attained her Age of 21: And therefore submitted, that She was become well intitled, under the said Will, to all and singular the real and personal Estates thereby devised; and that the said Will ought not to be considered as revoked by any subsequent Alteration in the Testator's Circumstances; nor ought the same to be considered as a mere Conditional Will intended to take Effect only upon Events which never happened; nor ought the Testator to be considered as having died intestate; and insisted on the Validity of the said Will, and that the Plaintiff was not unprovided for; That he had an Estate of 55 *l. per Annum*, under the Will of his Grandfather, and was intitled after the Death of his Grandmother to one fourth Part of a Farm in *Hertfordshire*, of the yearly Value of 25 *l.*

The

The Defendant *Benjamin Rudsdell*, and *Mary Rudsdell* (by their Guardian) put in their Answer, and respectively claimed under the said Deed Poll, of the 30th of *January* 1744, One third Part of the said Rent Charge of 50*l. per Annum*.

This Cause being at Issue, Witnesses examined, and Publication having duly passed; the due Execution of the Will so as to pass Lands; that the Estate in Question was 103*l. per Annum*, (whereof 43*l.* in Land, and 60*l.* in Houses, mostly old;) and the Births of the Children, and Deaths of the Father and Mother were severally proved, as above stated.

On the 11th of *March* 1771, the Cause having come on to be heard before the Lord Chancellor, his Lordship ordered that a Case should be made for the Opinion of the Judges of this Court, on the Will of the said *Jonathan Rudsdell*, upon the following Question, “Whether the Plaintiff, *Jonathan Rudsdell*, “is intitled to all, or any and what Part of the real Estates “devised by the said Will.”

THIS CASE was argued in the Court of King's Bench, on Friday the 18th of *November* 1771, by Mr. *Thomas Cowper*, for the Plaintiff, *Jonathan Rudsdell*, and by Mr. *Bearcroft*, on the other Side.

Mr. *Cowper* argued, that the Intention of the Testator must take Place, if not contray to the Rules of Law. Here, it was not inconsistent with the Rules of Law, though it is incorrect: And their Construction would defeat his Intention. The Testator considers his Wife as being to survive him. *Susannah* took nothing under the Limitation. She could not take, under the last Clause, at the Death of her Mother: For, She survived her Mother. The Provisions of the Will can take no Effect, as the supposed Events have not happened. The Heir at Law must take all the real Estate of the Testator, undisposed of by the Will.

He cited 1 *Peere Williams*, 426. *Hewit v. Ireland*; and a late Case in this Court of *White v. Barber*, in *Easter* Term last; of which I have given (as I hope and believe) a true and exact Report, in this present Volume, Page 2703. to Page 2708.

Mr. *Bearcroft*, on the other Side, argued that by the Letter of the Will, the Testator's Daughter *Susannah* is intitled to all. His Son *Jonathan* is not mentioned in it. A mere awkward Expression shall not defeat the Intention of the Testator: And this Testator's

Intention was altogether in Favour of his Daughter *Susannah*, who was then born, and known to him, and for whom he appears to have had a great Kindness and Regard, and for whom he has expressly provided in various Events particularized in his Will. And though the Contingencies of his Wife's surviving him, or being enfeint at the Time of his Death, never happened, yet the Intent of the Testator was, that in all Cases She should take a full Half. The eldest Son *Jonathan* is sufficiently provided for.

Mr. *Cowper* replied, that the Testator could not intend that *Susannah* should take all, if other Children should happen to be born: She was not the only Object of his Intentions to provide for his Children. Where a Devise takes Effect upon a Contingency that never happened, it must be in order to effectuate the Testator's Intention. So was the Case of *Jones v. Westcomb*: That Determination was agreeable to the manifest Intention of the Testator's Bounty.

CERTIFICATE.

“ Having heard Counsel on both Sides, and considered this
 “ Case, We are of Opinion, that the Testator having
 “ left several Children besides his Daughter *Susannah*, the
 “ Contingency upon which the real Estate or any Part there-
 “ of was devised to Her, has not happened: And there-
 “ fore that the said Estate descends to *Jonathan* the Plaintiff,
 “ as Heir at Law; subject to the Annuity of 50*l.* *per*
 “ *Annum*, provided for the Younger Children.”

MANSFIELD.
 R. ASTON.
 E. WILLES.
 W. H. ASHHURST.

November 9th, 1771.

Friday, 22d
 November,
 1771.

O'Neil v. Marlon.

THE Defendant was Keeper of the *Marshalsea* Prison: And being charged in an Action for a wilful and voluntary Escape, he would have defended himself under a Rescue by an invincible Force. The Case he relied upon was this: A *Habeas Corpus* had issued from C. B. to bring up the Prisoner from the *Marshalsea* to that Court: And the Prisoner being thereupon put under the Care of two Guards, He attempted to make his Escape; but
 One

One of his Guards prevented it. Then he was rescued by a Mob of 100 Butchers, or more; a Force too strong for any Resistance.

It was now argued by Mr. Serjeant *Kempe*, for the Plaintiff; and Mr. *Morgan*, for the Defendant.

The Serjeant took it up, 1st. On Principles; 2dly. on Precedents.

1st. The Keeper is an Officer of Public Justice; and, moreover, is intitled to a Fee and Reward; and might have had a sufficient Force. He cited 1 *Ld Raym.* 651. 655. as applicable to the present Case.

2dly. On Precedents—In the Case of *May v. Probie*, or, *May v. Probe & Lumley*. 1 *Ro. Rep.* 388. 441. it was resolved, that if a Prisoner, once in Custody in Gaol, escapes; the Sheriff is no liable; though on mesne Process.

In 1 *Strange* 429. 1 *H. H. P. C.* 601. *Easter Term 7 G. 1. Crompton v. Ward*, If the Party be once within the Walls of the Prison, though the Custody be on mesne Process only; yet a Rescue from thence, by any but common Enemies, will be no Excuse.

Here the Sheriff has full Notice.

The *Habeas Corpus* can make no Difference: For, it requires the bringing him in *safe Custody. The Law would import it, • *V. 1 Stra.* 431. though not expressed. *Dyer* 297.

Mr. *Morgan*, for the Defendant. There is no Case in Point: That in *Rolle* is a mere Dictum. The Case in *Strange* was after Judgment; and only One Officer was sent with the Prisoner. And there, the Sheriff was Defendant; who, it is said, might take the *Posse Comitatus*. But He could not do that, till afret Resistance. *Westm. 2. c. 39. 2 Inst.* 206.

On mesne Process, two Men were a proper Force, and sufficient.

The Keeper of the Marshalsea Prison (instituted by Patent 16 C. 2.) had no Right to take the *Posse Comitatus* in London.

But this Declaration can not be supported.

It is for a *voluntary* Escape. Therefore Negligence must be shewn. There is a Difference between Actions for *voluntary*, and Actions for *negligent* Escapes. *Hawk. P. C. Lib. 2. c. 18. Breaking Prison. 3 Rep. 44.*

He cited several other Books to shew that modern Judges were more favourable in their Constructions than former Ones. And he argued the Defendant is intitled to a favourable Construction; as the Plaintiff's Claim was not discharged: For, here was another Defendant liable.

LORD MANSFIELD—(to Mr. Morgan—)

You have looked very carefully into it: But it appears that there is no Case to be found, on the Side of the Defendant. The Cases are hard: But they are too strong to be got over.

16 E. 4. Fo. 3. is decisive. The Determination was against the Marshal of B. R. and therefore He was obliged to get an Act of Parliament.*

* V. 1 Stra.
431.

There is Nothing in the Objection “that the Declaration is “for a *voluntary* Escape.”

There may be Policy in the Cases: But they are very hard. There is no going into the Reason of them. I doubt it is impossible to get over them.

THE OTHER THREE JUDGES admitted it was a hard Case. But they said it might be inconvenient, if it were otherwise: It would introduce Excuses from Sheriffs for voluntary Escapes. And, as it was established by former Cases, They therefore concurred.

PER CUR' unanimously,

POSTEA to be delivered to the PLAINTIFF.

Mondav 25th
November,
1771. Seymour and Others *versus* Lord Courtenay and Others.

THIS was an Action of Trespas for disturbing the Plaintiff's *several* Fishery. At the Trial, the Plaintiffs were Non-suited.

Mr. Serjeant *Burland*, on behalf of the Plaintiffs, moved (upon *Saturday* 9th November 1771,) to set aside this Non-suit,
without

without Payment of Costs; and that they might have a new Trial. Lord *Clifford* was the real Plaintiff; and Lord *Courtney* the real Defendant: They were Both present at the Time of the Motion.

The Objection made by the Counsel for the Defendants at the Trial was to the Evidence adduced by the Plaintiffs to prove their Title. Their principal Exception to its Sufficiency was, that the Plaintiffs had only proved a Grant of this Fishery from Lord *Clifford*, with the Exception of an Oystery, and also a Reservation of a Right to Lord *Clifford*, the Grantor, of taking Fish for the Supply of his own Table: Which was so far from proving a Right to a *several* Fishery, that it was directly contrary to the Idea of it. A *several* Fishery must be *exclusive* of the Right of all other Persons: Whereas Others have here a Right to fish throughout the Whole Limits of the Fishery. Therefore the Plaintiffs cannot, upon this Evidence, maintain an Action of Trespass for disturbing them in their *several* Fishery. This Objection was allowed at the Trial: And the Plaintiffs were nonsuited.

There was also another Exception taken at the Trial; *viz.* that it was not proved that the *Soil* was granted to the Plaintiffs: And None can have a *several* Fishery, but the *Owner of the Soil*.

RULE to shew CAUSE.

On *Tuesday* 19th *November* 1771, Cause was shewn, by Serjeant *Davy*, Mr. *Dunning*, Mr. *Thomas Gould*, Mr. *Walker* and Mr. *Impey*, on behalf of the Defendants. They insisted that the Plaintiffs had declared upon a Title which they plainly have not. Their 2d 3d & 4th Counts are upon a *several* Fishery: And they claim an *exclusive* Right. But they have, in fact, only a limited, qualified Right. They have only proved a Right to a *Free* Fishery; not to a *separate* Fishery. Lord *Clifford* neither did grant, nor intended to grant an *exclusive* Right: He has expressly excepted the Oystery, and has reserved a Right to Himself to fish for every other Sort of Fish for his own Table. The Grantees therefore could not have a *separate* *exclusive* Fishery, when Others had a Right to fish as well as they. Neither can a Person have a *separate* Fishery, without being Owner of the Soil. And here Lord *Clifford* neither did grant, nor intended to grant the Soil. It is plain, therefore, that there ought to be Judgment of Nonsuit.

See 2 *Salk.* 637. *Smith v. Kemp*, *Tr.* 4 *W. & M.* B. R. and the Cases there mentioned, and *Cartbew.* 285. 286. S. C.

Serjeant

* V. 1 Inst.
4^b. & Bracton
fo. 208. &
1 Inst. 122.^a

Serjeant *Eurland*, Serjeant *Glynn*, and Mr. *Mansfield*, Counsel for the Plaintiffs, argued that the *Soil did pass* by this Grant, which was a Grant, they said, of a *several* Fishery: And a *several* Fishery may exist, *without* the Person's being Owner of the Soil*. A Subject may have a *several* Fishery; though the Crown has a Right to the Royal Fish. A Subject may have an exclusive *several* Fishery in an Arm of the Sea. A Grant of a *several* Fishery is capable of particular Reservations or Exceptions: The Thing may be granted; and yet a Part of it reserved. A Close may be granted, excepting an Acre; Woods, except certain Timber; Advowsons, except particular Presentations; and so of all other Inheritances: And why not the same, in the Grant of a *several* Fishery? A Fishery may be granted, except a particular Pool. If Lord *Clifford* had granted a Liberty of Fishing to a neighbouring Gentleman, yet he would still have had a *several* Fishery: Such a Grant would not have destroyed his Right. Here, the Reservation to Lord *Clifford*, of the Liberty of taking Fish for his own Table, is only a Licence: It don't derogate from the Grant. And the Oystery is only a Part of the Water. It is not necessary that a *several* Fishery be totally and absolutely exclusive of All other Persons. A *several* Fishery may be granted to *two* or more Persons; or it may descend to *two* or more Tenants in Common: And yet, in those Cases, it could not be an exclusive Right. A Tenant in Common may declare, as if possessed of the Whole. This was a *several* Fishery in Lord *Clifford*; and it must be the *same* in his Grantee, as it was in Lord *Clifford* the Grantor. Neither the Exception of the Oystery nor the Reservation to Lord *Clifford* can alter the Nature of the Fishery, and convert it from a *several* One into a *free* One or into a Fishery in *Common*: It still remains a *several* Fishery as to all the Rest of the World. This no more changes the Nature of the *several* Fishery, than a Licence to angle for a single Hour would do. It is not requisite that a *several* Fishery should be carried to such a rigid Degree of Exclusion: The Epithet of a *several* Fishery means no more than to distinguish such a Right from a free Fishery, or a Fishery in common.

THE COURT took a few Days to advise.

And on Monday 25th November 1771,

LORD MANSFIELD delivered their Resolution.

It is not necessary for Us, in the present Case, to give any Opinion "Whether a Person can have a *several* Fishery, *without* being Owner of the Soil;" As We think that it was the Intention

tention of this Grantor to pass *every thing* that was necessary to convey a *several* Fishery to the Plaintiffs.

If there had been no other Count in this Declaration, but the first (which is for breaking their Close covered with Water,) it might have been necessary for us to have determined whether the Ownership of the Soil was in the Plaintiffs, or not: But if there are other Counts in the Declaration, upon which the Plaintiffs might maintain their Action, that will be a sufficient Ground for us to set aside the Nonsuit. And we are all of Opinion, that the Plaintiffs might maintain their Action, upon the 2d, 3d, and 4th Counts, (which are for disturbing them in their *several* Fishery.)

We agree in the Position, that, in order to constitute a *several* Fishery, it is requisite that the Party claiming it should *so far* have the Right of Fishing, independant of all others, as that no Person should have a *co-extensive* Right with him in the Subject claimed: (For, where any Person has such co-extensive Right, there it is only a *Free Fishery*.) But we think that a *partial* independent Right in another, or a *limited* Liberty, does not derogate from the Right of the general Owner.

Here, Lord *Clifford* being the general Owner demised to the Plaintiffs, *reserving* a particular Species of Fishing, *viz.* the Oystery; which, in its Nature, is to be exercised in a particular Mode.

A *Reservation* is equal to a *Grant*. Therefore it brings it to the same Question, as if the Plaintiffs, being the general Owners, had *granted* the Sole Right of Fishing for Oysters, to Lord *Clifford*. And, taking that to be the Case, we think the Plaintiff would still have had a *several* Fishery to all Intents and Purposes, except as to the taking Oysters; which is no Part of the present Dispute.

And as to the Liberty reserved to Lord *Clifford*, of taking Fish for his own Table, that is a mere *limited Liberty*, and *not co-extensive* with the Right of the Plaintiffs, who can take Fish at all Times, and for all Purposes.

If this is not a *several* Fishery, it would not be any Species of Fishing, that the Law knows. It could not be a *free* Fishery; because no Person has a *co-extensive* Right with the Plaintiffs.

And as to it's being a *Common* of Fishery, that is not pretended. Therefore, on the whole, we think it can be no other than a SEVERAL Fishery; and that the Plaintiffs might maintain their Action, on those Counts adapted to such Right; and consequently, that the Nonsuit should be set aside, and a New Trial granted.

RULE—That the Nonsuit be set aside, (without Costs on either Side;) and a New Trial had.

The End of *Michaelmas* Term 1771, 12 Geo. 3:

Hilary

Hilary Term

12 Geo. 3. B. R. 1772.

Kershaw v. Cartwright and Pearce, Bail of Green.

Saturday,
25th January,
1772.

A Writ of Error, returnable in the *Exchequer* Chamber, having been brought upon a Judgment obtained against the Defendant *Green*, in this Court; and Writs of *Scire facias* having issued against the Bail in the Original Action in this Court; the said Bail obtained a Rule in *Easter* Term last, for staying the Proceedings against them in this Court upon these Writs of *Scire facias*, until the Writ of Error returnable in the *Exchequer-Chamber* should be determined; They undertaking to pay the Debt and Damages within four Days next after the AFFIRMANCE of the said Judgment, in case the same should be AFFIRMED. And the said Judgment was afterwards affirmed in the *Exchequer-Chamber*.

Whereupon, *Green* (who was the Original Defendant in this Court, and the Plaintiff in Error in the *Exchequer-Chamber*) brought a Writ of Error returnable in Parliament, to reverse the Judgment given in the *Exchequer-Chamber*.

Mr. *Lucas* then, on behalf of the Bail in this Court, moved for and obtained a Rule to shew Cause why the Proceedings against them on the Writs of *Scire facias* should not be further stayed till the Determination of the Writ of Error returnable in *Parliament*.

Mr. *Dunning*, on behalf of the Original Plaintiff in this Court, now shewed Cause against this last Rule for the further staying of the Proceedings against the Bail. He insisted that they were absolutely bound down by the *express Terms* of the former Rule,
“ to

“ to pay the Debt and Damages within four Days next after the
 “ Affirmance of the Judgment, in the *Exchequer-Chamber*.”

Mr. *Lucas* replied, that the Affirmance intended and necessarily to be understood by the first Rule, was and could only be the FINAL Affirmance of it. For it would be absurd to suppose that the Bail were to be liable and obliged to pay the Debt and Damages, *WHILST it remained doubtful and uncertain*, whether such Debt and Damages were payable at all, or not; and whether the Judgment of the Court of *Exchequer-Chamber* might not be itself reversed.

THE COURT were of Opinion with Him;
 and made his

RULE ABSOLUTE.

Rex v. Agar and O'Meara.

Monday, 3d
 February,
 1772.

ON the first Day of the present Term, Mr. *Wallace* moved for a Rule upon the Prosecutor, to shew Cause why *Conusance* should not be allowed to the University of *Cambridge*. He had in Court, the Warrant of Attorney, the Claim of Conusance, the Charter, and the Act of Parliament.

THE COURT gave him the following Rule:

Upon reading the Warrant of Attorney of the Chancellor, Masters and Scholars of the University of *Cambridge*; and the Claim of the Cognizance of the Indictment against the Defendants in this Cause; and the Proceedings thereon by the said Chancellor, Masters and Scholars of the said University, enrolled in this Court; and the Exemplification of the Letters Patent, and Act of Parliament in the said Claim mentioned; and also the Certificate of the said Chancellor, Master and Scholars; and the Affidavit of the said Defendants; it is Ordered, that *Wednesday* next be given to the Prosecutor, to shew Cause, why the said claim of Cognizance by the said Chancellor, Masters and Scholars, should not be allowed; upon Notice of this Rule to be given to the said Prosecutor in the mean Time.

This Indictment was found at the Quarter-Sessions at *Cambridge* holden on 12th *April* 1771. It was for an Assault and Battery committed upon the 18th of *March* preceding, by the Defendants *Agar* and *O'Meara*, upon *Thomas Fletcher* (the University-Printer,) at a publick Coffee-house in *Cambridge*. The
 Defendant

Defendant *O'Meara* was matriculated upon the Day on which the Indictment was preferred. Both the Defendants appeared at that *April*-Sessions, in pursuance of a Recognizance which they had entered into for that Purpose before a Justice of Peace for the Town and County of *Cambridge*, to answer for the Assault: But they did not then plead. Whereupon a Warrant was obtained from the Lord Chief Justice, between that *April*-Sessions and the next Midsummer-Sessions, against the Defendants; upon the usual Certificate "that an Indictment had been found against them, and that they had not appeared to it." The Defendants, upon this, entered into a Recognizance conditioned to appear and plead at the then next Quarter-Sessions. The Defendants then sued out a *Certiorari*, bearing Teste on the 19th of *June* (the last Day of *Trinity* Term,) returnable on the Morrow of All Souls, to remove this Indictment: And they entered into the usual Recognizance, "to plead to it and try it at the next Assizes for the County of *Cambridge*." They appeared, however, at the beforementioned Midsummer-Sessions; and, before they made any Use of their *Certiorari*, they moved (by their Counsel) to stay Proceedings on the Indictment; Alledging "that the University of *Cambridge* had Conusance of the Matter." But their Motion was refused. Upon which Refusal, they produce the *Certiorari*. Upon the 5th of *November* following, the Warrant of Attorney, "to claim Conuzance," was made. And the next Day, (upon the 6th) the Conusance is claimed: It is alledged by the Claim, to be on the Morrow of *All Souls*. The Conusance avers the Defendants to be Fellow-Commoners; and the Identity of their Persons; and that the Offence was committed within the Jurisdiction of the University: And they produce the Exemplification of their Patent from Queen *Elizabeth*; and put Mr. *John Wace* in their Place, to claim Conusance in their Names.

Serjeant *Glynn*, Mr. *Dunning*, and Mr. *Davenport* shewed Cause (upon *Tuesday* 28th *January* 1772,) against this Rule obtained by Mr. *Wallace*. After premising a general Observation "that these Claims of Conusance by Universities are inconvenient, and have not been nor ought to be favoured," they said that it ought at least to appear that they are *bonâ fide* intitled to such a Jurisdiction. Whereas, in the present Case, it is so far from appearing that Both the Defendants were matriculated Members of the University, that it appears on the contrary, that Mr. *O'Meara's* Matriculation was subsequent to the Indictment. And they cited the City of *Oxford's* Case in 2 *Ventris* 106. where this Privilege was denied to a Person who had been registred in that University but two Days; and was then registred merely for the sake of claiming the Privilege. But their principal Objection was, That

a Claim of Conuſance ought to be made at the *fiſt Moment*; as other Pleas to the Jurisdiction of a Court muſt be: And therefore this Claim ought to have been made on the fiſt Seſſions, when the Defendants appeared. They ſhould then have claimed the Privilege, and inſiſted upon it. Whereas they have affirmed the Jurisdiction of the other Court, by the Conduct they have uſed; and by bringing the *Certiorari*, and not making their Claim till the Return of it in *Michaelmas* Term. They came too late. They cited the Caſe of *Leaſingby v. Dr. Smith*, *Savilian* Profeſſor of Geometry in *Oxford*, *Tr.* 1769, 9 G. 3. C. B. reported by Serjeant *Wilson*, in his 2d Volume, pa. 406. where the Claim of Conuſance was reſuſed becauſe it was neither made in due Form, nor in due Time.

Mr. *Wallace*, Mr. *Jackson*, Mr. *Pemberton*, and Mr. *Read*, argued on behalf of the Univerſity, and in ſupport of the Rule. As to Mr. *O'Meara's* Matriculation being ſubſequent to the Indictment, they denied the Fact; and alledged that he was matriculated in the Morning of the 12th *April* 1771; and that the Indictment was not found till the Noon of that Day. However, as the Defendants are proſecuted jointly, the Privilege muſt extend to Both. It is the Privilege of the Univerſity. Beſides, Matriculation is not neceſſary: And Mr. *O'Meara* was a Fellow-Commoner of *Peterhouse*, at the Time of committing the Offence. The Practice of Matriculation at *Cambridge* differs from that at *Oxford*, as to the Time after being entered. Both of them were under the Diſcipline of the Univerſity at the Time of the Offence committed. The Charter extends to Perſons unmatriculated. Mr. *O'Meara's* Matriculation was not neceſſary, in *Cambridge*; either at the Time of the Offence, or at the Time of the Finding. However, the Univerſity were intitled to their Privilege, as to Mr. *Agar*. 22 *Lib. Aſſiz.* pl. 83. As to the Caſe cited from 2 *Ventris* 106. there was Fraud in that Caſe: but none in this. As to the principal Objection “that they came “too late”—They denied that any Time had been loſt: The Claim was made in due Time. This they endeavoured to prove, by recapitulating the ſeveral Steps taken in the Progreſs of the Affair: (which it is unneceſſary to repeat here, as they are particularized before, and will be again.)

THE COURT took Time to adviſe.

And now LORD MANSFIELD delivered their Opinion.

Taking it at preſent for granted, that this Claim ought to be “allowed, if made in due Time and in proper Manner,” it will be

be proper first to consider the Objection as to its not being made *in due Time*.

The established Rule of Law is, "That Conusance must be claimed in the *first* Instance, or at the *first* Day." And this must be admitted to be a very proper and reasonable Rule. For, if there were not *some Restriction* as to the Time of claiming Conusance Inconvenience would ensue. If the Claimant was permitted to come at *any* Time, he might suffer the Cause to be almost gone through, before he made his Claim: Which would be an apparent Prejudice to Suitors. Therefore, if you will interrupt the ordinary Course of Justice, You ought to stop the Plaintiff or Prosecutor in the first Instance.

Though all the Ancient Resolutions concur in this Opinion, yet there has been Variety of Opinions "*What* should or should not be *accounted* a Coming in the first Instance, within the Rule." And this Notion "of coming in the first Instance," (which some have said must be "*the first Day*," Others "that it must be *every Day*,") is to be expounded, according to the Authorities, by the true Meaning and Reason of the Rule; and not, in every Case, to be strictly confined to the same Point of Time. For instance, the *Return of the Original Writ*, in *Trespas*, where *Place is named*, or *Præcipe quod reddat*, where *Land is demanded*, may be the *first Instance*; because in these Cases, the *Writ* tells where the Cause of Action arises. But in *Debt* or *Detinue*, 'tis otherwise: For, 'tis *not known* where the Contract or Obligation was made; And therefore, *till the Plaintiff has counted*, the Claim needs not to be made. So in *Replevin*, the Place where the Cattle were taken does not appear, till the Plaintiff has counted; if it be between Strangers. But if a *Replevin* is sued against the Lord of the Franchise himself, there the Lord's Claim would come too late, *after* the Count; because the Law intends that he *knew* where the Taking was made, being himself a Party; and so, by not demanding his Privilege on the Writ, he gave the Court Seisin of the Cause: For, the Lord must use no Delay.

From these Authorities two Conclusions follow, and these two Propositions may be laid down. First, That before any Person is bound to claim Conusance, he is intended by Law to have had some *legal Notice* of his Franchise being intrenched upon: and therefore it is said to be named CONUSANCE. Secondly, That in order to bar him from making the Claim, there ought to be some *Laches* or *Default* in him; and a Time shewn, when he might have claimed it sooner, after such legal Notice.

The

The Court are now to judge upon this Claim, and the Certificates and Affidavits.

Let Us see then, from the Facts appearing to the Court, Whether a Time is shewn, when the Law will intend that they had Conusance of the Matter being within their Franchise; And whether any Default has been made, and Time lapsed when the Claim might have been sooner preferred; and Whether the Court was become fully seised of the Cause, at the Time when the Claim was actually made.

The Facts are these. The Assault is sworn to have been committed on the 18th of *March* last, at a Public Coffeehouse in *Cambridge*: And it is so laid in the Indictment. The Indictment was preferred and found, on the 12th of *April*. The Defendant *O'Meara* was matriculated on that Day: (it is not material, on the present Question, whether it was before or after the Bill was preferred.) Both Defendants appeared at the Sessions, in pursuance of a Recognizance entered into by them for that Purpose before a Justice of Peace of the Town and County, to answer for that Assault: But they did not plead. Between that *April*-Sessions and the following Midsummer-Sessions, a Warrant is obtained from me, against the Defendants, upon the usual Certificate of "an Indictment being found and "that the Defendants had not pleaded." The Defendants thereupon entered into a second Recognizance with fresh Sureties, "to "appear and plead at the next Quarter-Sessions." The Defendants sued out a *Certiorari*, tested the 19th of *June* (the last Day of *Trinity* Term,) returnable on the Morrow of *All Souls*, to remove the Indictment; and entered into the usual Recognizance "to plead to it, and try it at the next Assizes for the County "of *Cambridge*." The Defendants appeared at the Midsummer Sessions; and, before they made use of their Writ of *Certiorari*, moved (by their Counsel) to stay Proceedings on the Indictment; alledging "that the University of *Cambridge* had Conusance of "it." Their Motion was refused: And then they produce the *Certiorari*. Upon the 5th of *November*, the Warrant of Attorney is made, "to claim Conusance." Upon the 6th the Conusance is claimed: And which is, by the Claim, alledged to be on the Morrow of *All Souls*.

Here, then, is *legal Notice* "that the Offence was committed, "and prosecuted too within their Franchise, on the 12th of "*April*:" For, it so appears upon the Face of the Record; and therefore is as strong as where the Law intends Notice from the Writ, where the Cause of Action arises in the Cases alluded to.

The Proceedings upon this Indictment have been in the usual Course, in a Court of Record within the Franchise: And the Defendants were bound to appear, and answer to the Indictment (if found against them) at the *April* Sessions. But it is not necessary to determine, "that the Claim should have been made *then*." For, they were bound by the second Recognizance, "to appear and plead at the *Midsummer* Sessions:" And they did then appear, and made an ineffectual Effort to take Advantage of the Claim of the University against the Jurisdiction of the Sessions.

Here then is a Time shewn, when the Chancellor, Masters, and Scholars of the University *might* have made their Claim. And there is no Pretence to say that the Prosecutor did any act to prejudice the Lords of the Franchise, or oust them of it collusively, or use any Artifice to prevent their making their Claim in due Time. But they come *too late*. They did not use the Writ of *Certiorari*, till *after* their Motion upon the Claim had been heard and denied: And when the Claim was in fact made here, the Court were in *full Possession* of the Cause, upon the Writ of *Certiorari*, which was returnable upon the *Morrow of All Souls*.

THE CLAIM must be DISALLOWED;

and

THE RULE DISCHARGED.

Rofs *versus* Johnson and Dowson.

Tuesday, 4th
February,
1772.

AN Action of *Trover* was brought by *Hugh Rofs Esq*; against *John Johnson* and *William Dowson*, for certain Goods mentioned in the Declaration. "Not Guilty" was pleaded, and Issue joined. The Cause came on to be tried at *Guildhall*, before Lord *Mansfield*, at the Sittings after *Michaelmas* Term 1771: When the Plaintiff was nonsuited, subject to the Opinion of the Court on the following Case.

The Goods in question, being the Property of the Plaintiff, were delivered by the Captain of a Vessel, to the Defendants as *Wharfingers*, for the Use and upon the Account of the Plaintiff, to whom they were directed; but were *stolen or lost* out of their Possession; and afterwards, before the Commencement of this Action, were demanded by the Plaintiff of the Defendants; to

VOL. V.

3 Q

whom

whom he tendred the Wharfage for the same: But the Goods were not delivered to him.

The Question for the Opinion of the Court was, "Whether this Action will lie."

If the Court shall be of Opinion "that this Action will lie," then the Nonsuit to be set aside; and a Verdict entered for the Plaintiff, for 92 *l.* Damages and 40 *s.* Costs.

Mr. *Mansfield*, for the Plaintiff, argued, that *Trover* would lie.

In *Trover*, nothing more is necessary to be proved, than the Property being in the Plaintiff; and that the Defendant has converted them. It is not necessary to prove *actual* Conversion.

A Demand and Non-Delivery are Evidence of a Conversion; and are sufficient, unless the Defendant can give some legal Excuse for the Non-Delivery. The Goods being *stolen* or *lost* is no Excuse to a *Wharfinger*, who takes them for *Hire*. *Isaack v. Clerk, Moore* 841. A Pawnee is bound to deliver the Goods pawned.

Mr. *Walker, contra*, for the Defendants, argued that this Action of *Trover* could not be maintained. *Trover* can't be maintained, unless the Defendant uses the Plaintiff's Property as his own. Goods may be withholden by a Person who has a Lien upon them: And he instanced in Pawns, Distresses, and Carriers detaining till paid for the Carriage. Bare withholding is not making use of them as his own: And without that, *Trover* will not lie. He was not obliged, he said, to maintain "that *no other Action* would lie:" It was enough for his Purpose, "that the present Action will not lie." A Demand and Refusal is only Evidence of a Conversion. And *Trover* will not lie for mere Negligence, for losing the Goods, without any actual Wrong. And so is 2 *Salk.* 655. on *Trover* against a Carrier, for losing a Box.

Mr. *Mansfield* agreed, that where a lawful Reason is shewn for not delivering the Goods, the Defendant is not to be considered as guilty of a Conversion. But here is no lawful Reason shewn, why they are not delivered: And therefore the mere Non-Delivery does amount to a Conversion. If they are, in fact, lost or stolen; what is that to the Owner? It does not alter the Obligation

tion which the Defendants are under to deliver them to the Owner: Nor can the Owner know what is become of them.

LORD MANSFIELD declared his Disapprobation of Nonsuits, founded upon Objections which had no Relation to the Merits of a Cause. But he looked upon it as established upon Principles and Authorities, that *Trover* would *not* lie in the present Case; but that it must be an Action *upon the Case*.

It is impossible, he said, to make a Distinction between a *Wharfinger* and a *Common Carrier*. They both receive the Goods upon a Contract. Every Case against a *Carrier*, is like the same Case against a *Wharfinger*: But, in order to maintain *Trover*, there must be an *injurious Conversion*. This is not to be esteemed a *Refusal* to deliver the Goods. They *can't* deliver them: It is not in their Power to do it. It is a bare *Omission*.

Mr. Justice ASTON agreed that this being a bare Omission, and no Evidence of a Conversion, *Trover* would not lie; but the clear Remedy was by Action upon the *Case*. And he cited 1 *Ventris* 223. *Owen v. Lewyn*; where *Hale* said, "that if a Carrier loseth Goods committed to him, a general Action of *Trover* doth not lie against him."

Mr Justice WILLES and Mr. Justice ASHHURST concurring in Opinion with his Lordship and Mr. Justice ASTON,

THE COURT ordered that the NONSUIT should stand.

Beck on the Devise of Fry v. Phillips.

Tuesday, 4th
February
1772.

THIS was an Ejectment tried at the Assizes for the City and County of *Bristol*, on 16th of *August* 1771, before Mr. Justice *Blackstone*: A Verdict was found for the Plaintiff, subject to the Opinion of this Court, upon the following Case—

William Jones Esq; was seised in his Demesne as of Fee, of a certain Garden and Summer House, (which are the Premises in question in this Action;) and being so seised, demised the same, by Indenture of Lease, bearing Date 24th *March* 1721, to one *Richard Hicks* of the said City of *Bristol*, Grocer, to hold from 15th *March* 1721, for 99 Years, if the said *Richard*, *Sibella* his Wife, and *Hannah* their Daughter, or either of them should so long live; under the yearly Rent of four Pounds Sterling. *Richard Hicks* by virtue thereof entered, and was possessed of the said Term. Being a Trader, He afterwards, in the Year 1722, com-

committed an Act of Bankruptcy; and a Commission issued; and he was duly declared a *Bankrupt*; and the Commissioners afterwards *assigned* the Premises and the Term and Estate of the said *Richard Hicks* therein, by Indenture bearing Date the 10th Day of *January* 1722, to *Robert Addison*, *Thomas Elbridge*, and *William Barnes*. The said *Robert Addison*, *Thomas Elbridge*, and *William Barnes*, being so possessed of the said Term, afterwards, by Indenture bearing Date in the Year 1722, *assigned* the said Premises, in Consideration of twenty Pounds, to *Edward French*, M. D. The said *Edward French*, by virtue thereof, entered upon the Premises, and was possessed of the said Term, until the Time of his Death. *Richard Hicks* and *Sibella* his Wife departed this Life in or about the Year 1725: *Hannab Hicks* is still alive. The said *Edward French*, in or about the Year 1741, departed this Life; having first duly made and published his last Will and Testament, and thereof appointed his Wife *Elizabeth* sole Executrix. She duly proved the said Will, and possessed herself of the said Term, as Executrix as aforesaid; and being so possessed, afterwards, by Writing under her Hand, indorsed on the Back of the aforesaid Indenture the following Words, *viz.* "I assign all my Title to this Garden, with a large Roller equipped with Iron, to Mr. *Thomas Peninton*, for Six Guineas, received, 4th May 1744. *Elizabeth French.*" The said Writing was neither sealed or delivered by the said *Elizabeth French*, nor stampd according to Law. (The Garden in the said Writing mentioned, is the Premises in question.) The said *Thomas Peninton* entered upon the Premises by virtue thereof; and possessed the same until the 22d *February* 1749. Afterwards, the said *Thomas Peninton*, by Writing under his Hand, indorsed on the Back of the aforesaid Indenture the Words following; to wit, "I assign all my Title to the Garden within mentioned to Mr. *John Fry*, for four Pounds Sterling received of him the 22d of *February* 1749. *Thomas Peninton.*"

The said Writing was not sealed nor delivered by the said *Thomas Peninton*, nor stampd according to Law. (The Garden therein mentioned is the Premises in question in this Action: The said *John Fry*, is the Lessor of the Plaintiff in this Action.) The said *John Fry* immediately thereon entered into and possessed the same, until the Year 1756. *Elizabeth French* departed this Life in the Year 1749; having duly made and published her last Will and Testament, and thereof appointed *John Sealy* Executor; who duly proved the said Will, but never entered upon the Premises in question, nor ever possessed the same, nor did any Acts of Ownership thereto relating, until the Time of his Death, which happened in the Year 1760. The said *John Sealy*, on the 19th Day of *February* 1760, duly made and pub-

lished his last Will and Testament, and thereof appointed his Sons, *John, William, and Edward, Executors.* *John* only proved the Will, and took upon Himself the Executorship of the said Estate and Effects. The said *John* never entered upon the Premises in question, nor ever possessed Himself in any Manner thereof, or did any Acts of Ownership thereto relating. *John Fry* gave up the Possession of the said Premises in the Year 1756. And thereupon the said *William Jones*, being seised thereof in Manner aforesaid, entered upon and demised the said Premises to the said *Thomas Phillips*, from the 24th Day of June then next ensuing for 99 Years, if the said *Thomas Phillips, Mary* his Wife, and *John Humphries* of Bristol, Book-keeper, should so long live, under the yearly Rent of 4*l.* Sterling. The said *Thomas Phillips*, by virtue thereof entered, and was possessed thereof, and hath continued in the Possession thereof ever since until the present Time. The said *Thomas Phillips* is the Defendant in this Action: And He hath, at a very great Expence, improved the Premises, by sundry Buildings thereon erected; so that the same are become of the Annual Value of 27*l.*

That on the second of *April* 1770, the aforesaid *John Sealy*, Executor of *John Sealy* deceased who was the Executor of the aforesaid *Elizabeth French*, by Indentures of that Date duly executed under his Hand and Seal, assigned all his Right and Interest and Estate in the Premises in question to the said *John Fry*; the said Defendant *Thomas Phillips* being at that Time in Possession of the said Premises in Manner aforesaid; the said *John Fry* having not been in Possession thereof since the Year 1756, as aforesaid; and the said *John Sealy* having never entered thereon, or any ways possessed the same.

The said *John Fry*, on the said 2d of *April*, demised to the Plaintiff; who entered, and was possessed. And the Defendant ejected Him, as in the Declaration mentioned. And thereupon a Verdict is found for the Plaintiff, subject to the Opinion of the Court of King's Bench "Whether any thing passed to the said *John Fry*, by the said Indenture of Assignment of the said *John Sealy* made upon the 2d of *April* 1770, in manner aforesaid."

This Cause had been formerly before the Court, so long ago as on *Friday* 23d *November* 1770, upon a former State of the Case, which included the Evidence given of the Commission of Bankruptcy. It was then argued by Serjeant *Burland* for the Plaintiff, and Mr. *Hobhouse* for the Defendant: And the Argument turned upon two Points; 1st "Whether the Evidence stated was suffi-

“cient to prove the Commission;” 2dly “Whether any thing
“could pass to Fry, by the Assignment from the Executors of
“French.” And the Court, being of Opinion with the Defen-
dant’s Counsel, on that Argument, “that the Evidence was
“not sufficient to prove the Commission,” ordered the *Postea* to
be delivered to the Defendant; Lord *Mansfield* then observing, that
this Determination upon the first Point served the Counsel the
Trouble of a long and learned Argument on the second.

However, in the Event, it happened not to have this Effect.
For, a new Ejectment being brought, and a new Case stated,
(namely, the One abovementioned,) it came on again before the
Court on *Friday 15th November 1771*; and was argued by Mr.
Moysey for the Plaintiff, and Mr. *Hobhouse* for the Defendant.
The only Question then was “Whether any thing passed to Fry,
by the Indenture of Assignment.”

For the Plaintiff, it was urged, that in an Ejectment there is
no Need to have Recourse to a Right of Entry. Besides, here the
Interest is a Chattel Real. There was a Possession in *John Sealy*
the Assignor, sufficient to enable him to convey. *Smartle v.*
Williams, 3 *Lev.* 388. Fry, being Tenant at Will to Mrs. French,
could not dispossess his Lessor. *Poufley v. Blackman* cited in 1
Burrow, 112. But even supposing and admitting that there was
no Constructive Possession in *John Sealy* the Assignor, yet there
was no Ouster or Dispossession of Him: And without an actual Ouster
or Dispossession, his Assignment is not invalidated. *Bruerton v.*
Rainsford, *Cro. Eliz.* 15.

For the Defendant, it was objected that Nothing could pass
to the Lessor of the Plaintiff, from *John Sealey* the Assignor; He
being out of Possession. *Co. Lit.* 240. *Dalison* 81. *Cro. Eliz.* 15.
Bruerton v. Rainsford. *Blunden v. Baugh*, *Cro. Car.* 302. *Smartle*
v. Williams, 3 *Lev.* 387. and 1 *Salk.* 245. *S. C.* *Stephens v.*
Hanham, 3 *Lev.* 312. and 4 *Mod.* 48. and *Skinner* 300. and *Holt*
263. Therefore a Right of Entry not being assignable; and this
being only a Right of Entry; this Assignment is void. 1 *Leon.*
166. 1 *Anderson* 66, 77. *Plowden* 81, 87, 88, 89. *Dyer* 74.
pl. 19, 20. *Co. Littleton* 369. The Ancient Mode of Ejectments,
Sealing the Lease upon the Land, shews the Necessity of Posses-
sion, as well as of a Right of Entry. And even now, upon a
vacant Possession, the Lease must be sealed upon the Land. Here,
the Assignor had, at most, but a Right of Entry. It is true, that
by the first Indorsement of the Executrix, *Peninton* became Tenant
at Will; and his Possession was, by Construction of Law, the
Possession of the Assignor. But a Tenant at Will can’t assign.
Co.

Co. Lit. 57. 2 Ro. Abr. 46. Cro. Car. 302. *Elunden v. Baugh*. *Powlesley v. Blackman*, Cro. Jac. 266. Whether the Doctrine of Election applies to this Case, or not, it is equally against the Plaintiff: So, whether he was ousted, or in Possession. Here has been a Space of 20 Years, without any Act of Ownership. Therefore he can't elect to be in Possession: Both his Entry and his Action are gone. He is too late to make any Election, in point of Time: Above 20 Years have run, since the Constructive Ouster.

In Reply, it was observed (amongst other Things) that no Acquiescence can amount to a Disseisin, which is a Tort; and that there must be an adverse Possession, to bring it within the Statute of Limitations. And it was said, that this Deed was rather a Confirmation of *Fry's* inchoate Right, than an Assignment.

LORD MANSFIELD—If you go upon the Election, the Circumstances are material. Where you have the Right of Possession, You are not disseised. If you are reduced to a Right of Action, that is another Thing. A material Part of this Case is *not stated*; viz. “WHY *Fry* gave up the Possession in 1746.” I wish this to be stated; and the *Consideration* upon which he did it.

It was answered, that it was apprehended at *that* Time, “that the *Cestui qui Vie* was dead”; though she was, in fact alive.

LORD MANSFIELD—That ought to be stated or found. *Fry* had the whole Right. If he gave it up by Mistake, he ought *not* to be bound: If he received a *Consideration*, he *ought* to be bound.

Adjourned till Tuesday.

On which Tuesday, 19th November 1772,

LORD MANSFIELD told the Counsel, that a Point had occurred to the Court, which had not been mentioned in the Argument: Which was this. If the Indorsement by the Executrix carried a legal Interest in the Term to *Peninton* from *Elizabeth French*; and *Peninton's* Indorsement to *Fry* had a like Effect; then *Fry* had the whole Lease in him: And by the Statute of Frauds, it may be assigned by a **Note in Writing*. And such a Note in Writing needs not to be either sealed or delivered or stamped, as * V. 29 C. 2, c. 3. §. 3. a Deed must. And his Lordship mentioned a Case in the Common Pleas, in Trinity Term 1755, 28 & 29 G. 2. between *Farmer*, on the Demise of *Earl*, and *Rogers*: in which, Mr. Justice *Aston*

* V. §3.

Aston said he was concerned; and that it is reported in a Book published by the present Lord Chancellor. It is also reported by Serjeant *Wilson*, in his 2d Volume, pa. 26. He says it was resolved, "that it appears by the Statute of Frauds and Perjuries * that a Lease " for any Term of Years may be created by Writing, without Deed; and that the same may be surrendered " by Deed, or Note in Writing. And the Court held that there " was no Occasion for any Stamp-Duty upon the Note or Indorsement, it not being a Deed." So in the present Case, the legal Interest in this Term might be assigned by a Note in Writing.

Mr. Justice *ASTON* was of the same Sentiment. *Elizabeth French*, by Writing under her Hand, indorsed on the Back of the Indenture, assigned to *Peninton*. This Writing was neither sealed, delivered, nor stamped. *Peninton* entered, and then assigned in the same Manner to *Fry*. The Executor of *Elizabeth French* had nothing to convey.

LORD MANSFIELD—The Court must take the *Whole* of what is stated in the Case: And upon the *Whole* of the Case, the Plaintiff has a Right. Therefore let it stand in the Paper for the next Paper-Day: And if Mr. *Hobhouse* desires to argue it, he will be at Liberty to do so.

On which Day (*Tuesday 4th February 1772*,) Mr. *Hobhouse* being ill, it was adjourned.

Mr. Justice *WILLES* mentioned the Case of *Harker* and Others against *Birkbeck* and Others, *Tr. 4 G. 3. B. R. ante 1557, 1563*.

On 7th *February 1772*, the Cause standing in the Paper; and Mr. *Hobhouse* not being come to Town, nor any other Counsel desiring to argue for the Defendant.

Mr. Justice *WILLES* and Lord MANSFIELD observed that the last mentioned Case cited from my 3d Volume, pa. 1557. and 1563. (which was a Question about an unstamped Writing signed by a Person who had no Interest in the Soil, for the Purpose of digging and searching for Lead-Ore,) did not contradict their present Opinion "that the Assignment now in question was " sufficient, though neither sealed delivered or stamped."

THE COURT therefore ordered the

POSTEA to be delivered to the PLAINTIFF.

Note—

Note—

I have Reason to think that the Objection meant to be urged on behalf of the Defendant, was, “that the Assignment ought to have been by *Deed*; and that such *Deed* ought to have been *stamped*;” And that his own Counsel were not really of Opinion that the Objection ought to prevail.

Mace, *qui tam* &c. *versus* Lovett.

Tuesday 11th
February
1772.

THIS was a *Qui tam* Action on the Statute of Usury. The Record had been made up ready for Trial, in *Trinity* Term last: but it was withdrawn by the Plaintiff's Attorney, upon his discovering a Mistake in the Declaration, respecting the Sum lent.

Two counter Motions had been made, in the former Part of this Term; *viz.* The Defendant had obtained a Rule to shew Cause why Judgment should not be entered for Him, as in Case of a Nonsuit: And the Plaintiff had obtained a Rule for the Defendant to shew Cause why the Declaration should not be amended. The Amendment prayed was in the Sum lent; namely, to alter it from 100*l.* to 88*l.* For, the Defendant was charged by the Declaration, to have taken 12 *per Cent.* upon 100*l.* whereas, in fact, only 88*l.* was actually paid.

Cause was now shewn, upon both the said Rules.

As to the Amendment.—

Mr. *Dunning* and Mr. *Mansfield*, on behalf the Defendant, argued against it. They said, it was making a *New Charge*: It was to alter the *Quantum* of the Sum alledged to be lent.

It is a *New Offence*: The Penalty is varied. The sole Object of the Application is in order to get rid of the Protection of Time so necessarily given in Actions of this Kind. They cited a Case of *Hodges v. Teale*; (in which it was said, that Mr. *Mansfield* was concerned,) as being like the present Case, only after Trial; where Mr. *Norton* moved to amend, in a *qui tam* Action, against an Attorney, and was refused, because it was a new Charge and materially changed the Offence.

Mr. *Wallace*, on behalf of the Plaintiff, argued in support of this Rule for Amendment. It is amendable, whilst in Paper.

We withdrew our Record. It has never been tried: And till a Verdict, it is not considered as being upon Record. The Case of *Bondfield, qui tam, and Miller, Mich.* 1 Geo. 3. B. R. (v. *ante*, Vol. 2. P. 1098.) is precisely this Case. Here, the Person is the same as before; the Penalty is less.

LORD MANSFIELD was not in Court.

Mr. Justice ASTON stopped Mr. *Wallace*; the Court being satisfied that in this Case the Amendment may be made. The Court have gone a great Way in allowing Amendments, towards the Attainment of Justice. They have amended in Cases where the limited Time of bringing an Action would run against the Plaintiff, if he were to be put to bring a new One: So was the Case of the * *Dutchess of Marlborough v. Widmore*. There is no Distinction between *qui tam* Actions, and civil Actions, where an Amendment at Common Law is applied for. The Court won't alter the Charge, indeed. But the Amendment here prayed will not do that: It is only to alter the Sum of 100 l. into a less Sum of 88 l. And the penalty will consequently be reduced. *Bond, qui tam, v. Miller*, was like this Case. However, the Amendment must be upon Payment of Costs.

* H. 4 G. 2.
B. R. v. 1
Stra. 890.
Fitz. Gib.
193. and I
have a full
note of it.

Mr. Justice WILLES concurred. And he likewise observed that it was to *lessen* the Sum, not to increase it. It is a mere Slip. The Courts are now *liberal* in permitting Amendments. *Bond* and *Miller* is like this Case: But the Attorney's Case that has been mentioned, where Mr. *Norton's* Motion to amend was refused, made a new Cause of Action: One of the Charges against him was upon one Act of Parliament; the Other, upon another.

Mr. Justice ASHHURST (who was just now gone out of Court) had left (Mr. Justice *Willes* said,) with Mr. Justice *Willes*, his Concurrence in the same Opinion.

PER CUR'—Rule for the Amendment
made ABSOLUTE.

The End of *Hilary* Term 1772, 12^o Geo. 3.

Easter

Easter Term 1772,

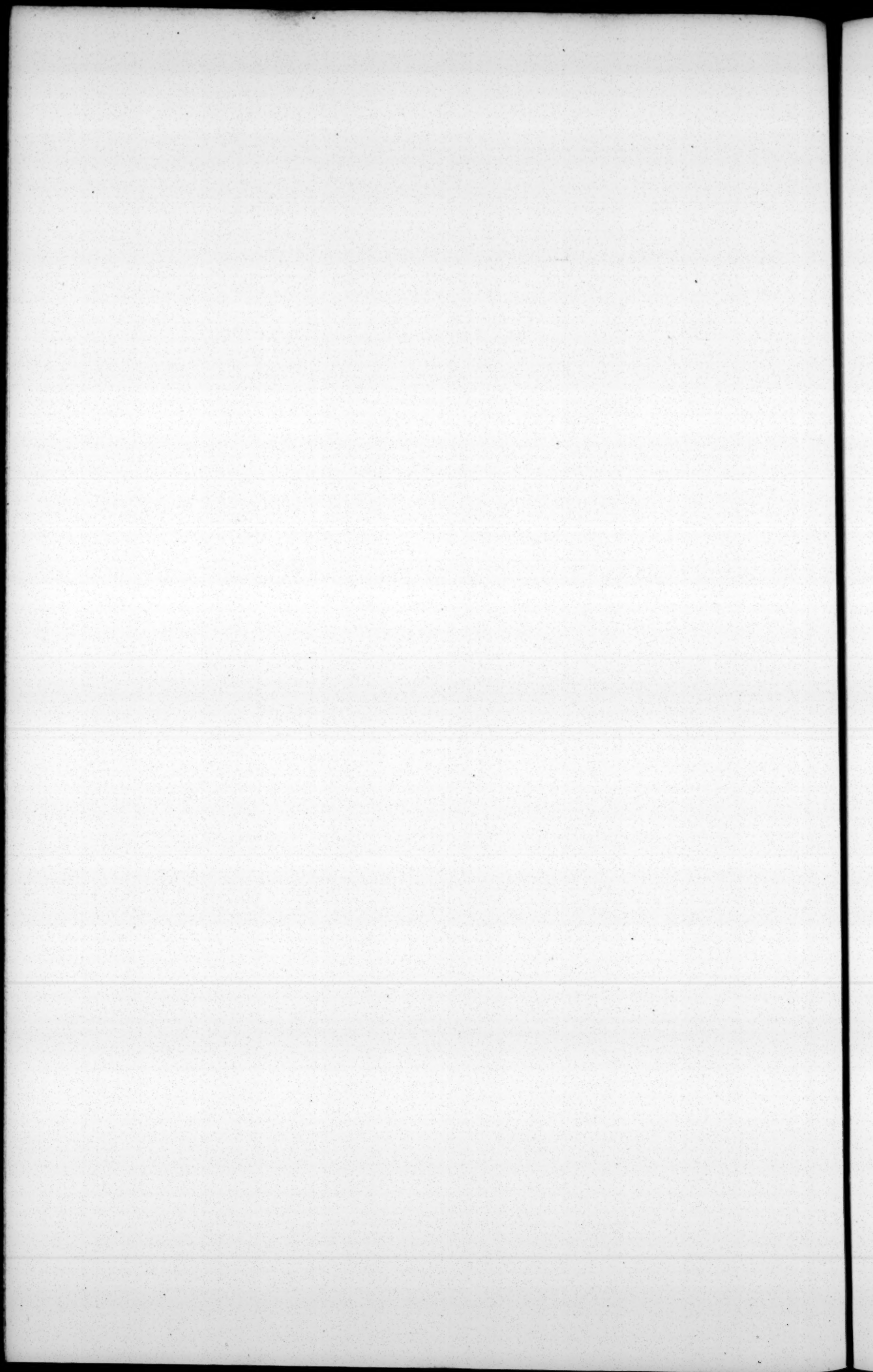
12 Geo. 3. B. R.

ANOTHER GENTLEMAN having lately undertaken the like Task of publishing "REPORTS of CASES " Adjudged in the Court of *King's Bench*;" and having already printed a large Folio Volume of them, beginning with this same *Easter Term* 1772, 12^o Geo. 3, and ending with, and including *Michaelmas Term* 14^o Geo. 3; and having expressly declared in his Preface, " that he has a Second " Volume preparing for the Press;" A decent Opportunity is thereby given to Me, of retiring: Which, perhaps, I ought to have done much sooner. However, it will be reasonably expected from Me now, that I should take *Horace's* Hint, "*Solvere * senescentem equum*"; and conclude this Fifth Volume of my REPORTS, at the Point of Time where Mr. *Lofft* begins his first Volume. And I am the more desirous of embracing this Opportunity, lest I should seem, (if I were to proceed further,) to set myself up as a Competitor with any other Reporter: Which is as far from my Intention, as it is from my Inclination.

* *Solve senescentem maturè sanus equum, ne
Peccet ad extremum ridendus, et ilia ducat.*

Epistolar. Lib. Ep. 1. Ad Mæcenatem. l. 8, 9.

THE END OF THE FIFTH VOLUME.



A
T A B L E
OF THE
PRINCIPAL MATTERS
Contained in this Volume.

Action,

FOR Money had and received to Plaintiff's Use, does not lie for East-India Stock. 2592.

Against one Partner alone, where there are several, and the Demand is upon the Partnership—This must be pleaded in Abatement: It can not be given in Evidence; for, the not pleading it in Abatement, is a Waiver of the Objection. 2613, 2614, 2615.

On a Joint Bond can not be brought against one of the Obligors alone: And if it appears upon the Face of the Declaration, it may be moved in Arrest of Judgment. *Ibid.* Otherwise must be averred. *Ibid.*

Against a Carrier will lie in the Name of the Consignor, upon his Agreement. 2680, 2681. See Carrier.

Where a Common Carrier and a Wharfinger are not distinguishable, as to Goods delivered; and where Trover will not lie, but it must be an Action upon the Case. 2827. See Trover.

Trover will not lie against either of them, where the Goods are stolen or lost: But the Remedy must be by Action upon the Case. 2827.

A Table of the Principal Matters

Admittance. See Surrender.

Surrender and Admission make but one Title; which is not complete till Admission. They are different Parts of the *same Conveyance*; The Former, the substantial Part; the Latter, the formal. The Admittance must follow the Surrender; and shall *relate* back to it, and operate from the Time of it. The Lord is compellable, by *Mandamus* or Decree, to admit. He is only an *Instrument*. After Admittance, the Heir of the Surrenderee who died before Admittance, is in by the Person who made the Surrender, and *not by the Lord*: And such Heir is in by *Descent*, and not by Purchase. 2785 to 2787.

Such Heir shall not avoid the *Free-Bench* of the Widow, upon the Objection of her Husband's dying before Admittance. *Ibid.*

Affidavit

Of a *Juryman*, can not be read *as to what he thought or intended*, when he gave the Verdict. 2667. See *Libel*.

Amendment

Of a Judgment against an Executor, *de bonis propriis*, by making it *de bonis Testatoris, si, &c.; et si non, tunc de bonis propriis*,—Amended as a Mistake of the Clerk: (contrary to *Ld. Raym.* 182.) 2731.

In a *qui tam* Action for Usury, the Declaration was amended, by altering 100 *l.* (the Sum stated to be lent,) into a less Sum of 88 *l.* And this was after the Record had been made up, carried down to Trial, and withdrawn by the Plaintiff. 2834. *V. supra*, 1098, 1099.

Appeal of Death.

The Method and Form of *Proceeding* upon it. 2643, to 2657. And again, Page 2793 to 2802.

If the Defendant had *bad his Clergy*, it is a good *Bar* to an Appeal. Page 2801.

Assign.

Contained in this Volume.

Assignment

Of a Term—may be by a *Note in Writing*; without either *Seal*, *Delivery*, or *Stamps*. 2832.

Jones granted for 99 Years, if three Persons should so long live. Two of them died. The Executrix of the Grantee assigned to *Peninton*, by an Indorsement on the Lease, in these Words, "I assign all my Title, &c." Which *Writing* was neither sealed, delivered, nor stamped. *Peninton* entered, and exactly in the same Manner assigned to *Fry*. *Fry* entered, and was possessed; but in 1756, gave up the Possession. The Executrix of the Grantee was then dead. Her Executor had never entered, or done any Act of Ownership; but in 1770, he regularly assigned to *Fry*: But at that Time *Philipps* was in Possession, under a Grant from *Jones*, made to him upon *Fry's* giving up Possession. Question—"Whether any thing passed to *Fry*, by the last mentioned Assignment made to him by the Executor of the Executrix of the Grantee; Which Executor himself never was in Possession." Which Question the Court did not determine; because, upon the Whole of the Case, *Fry* had a Right. *Ibid*.

Auctioneer

Is liable to the Bidder's Action for the Deposit; where the Bidder has sufficient Reason not to proceed. 2639, 2640. And his paying Money into Court is an Acknowledgment That he is liable. *Ibid*.

Averment. See Pleading.

It may be averred as a Fact, "That a *Latitat* was prosecuted in "Vacation Time:" though it is void, if tested out of Term. 2588.

Bail.

PERSONS committed on 13 & 14 C. 2. c. 11. sect. 6. For forcibly resisting, &c. Custom-house Officers in the Execution of their Duty, to REMAIN in Prison till the next Quarter Sessions, can not demand to be bailed, as of Right, 2642.

Common Bail shall be accepted, in an Action upon a Judgment of Nonsuit merely for Costs. 2660, 2661. *Vide supra*, 2117. 2118.

Surren-

A Table of the Principal Matters

Surrender of the Defendant before the Return of the Writ is no Reason for staying Proceedings upon the Bail-Bond. Nothing can be a Performance of the Condition of a Bail-Bond, but putting in Bail. 2683.

Special: Common—The Affidavit made for the Purpose of holding to Special Bail had only *one Stamp*, and *joined Debt and Assumpsit* together. This is an Impropriety: And the Defendant was discharged on *Common Bail*. 2690, 2691.

Undertaking that, on *staying Proceedings* against them until the *Affirmance* of the Judgment, they will pay the Debt and Costs within four Days after the *Affirmance*; this is to be understood a *final Affirmance*. 2820. See *Error*.

Bankrupt.

Petitioning Creditor's Debt was of more than *Six Years* standing: But the Bankrupt had *submitted* to the Commission, without objecting. This Objection shall not afterwards be taken by a third Person. 2628 to 2630.

Bill of Exchange.

The Indorsee of an Inland Bill of Exchange, tendred the Bill for Acceptance: The Person upon whom it was drawn *refused to accept it*. The Indorsee kept the Bill three Weeks, *without giving Notice of such Refusal*. The Drawer *remained solvent during those three Weeks*; and then failed, before the Bill became payable. The *Loss* falls upon the Indorsee, who *neglected to give Notice* of the Refusal to accept it. 2672.

Bonds—

Joint; and Action brought against *One Obligor only*. 2611, to 2614. See *Action, Pleading*.

Bridges.

If a Bridge becomes of *public Utility* to the County, it shall be *repaired* by the County; though not originally built at the County Expence. But if the Person who made it for his private Benefit, *continues to receive that private Benefit*, he *himself* shall repair it. 2597, 2598.

Contained in this Volume.

Carrier.

AN ACTION lies against him, in the Name of the *Consignor*, who agreed with him, and was to pay him: And the Carrier has Nothing to do with the *Vesting of the Property*, as between the *Consignor* and the *Consignee*. 2680, 2681.

Where Goods delivered to a Common Carrier (or to a *Wharfinger*) are *stolen*, or *lost*, Trover will not lie: The Remedy is by Action on the Case. 2826, 2827. See *Trover*.

Cases doubted or denied.

2Ld. Raym. 1280 The *Queen* against the Inhabitants of *Barkin* &c. See Poor-Tax. 2636.

Bunbury's Reports—treated as *very loose Notes*; which He never intended to be printed. 2658, 2659.

Moore 635. *Rayman v. Gold.* } 2609. See Devise, Term of
Cro. Jac. 74. *Horton v. Horton.* } Years.

Villars v. Parry and Moor. 1 Lord Raym. 182. "That a Judgment against an Executor, *de bonis propriis*, is *not* amendable." 2731. See Amendment.

Churches—

New—The *new Incumbents* are not intitled to the Profits, till the Agreements and Settlements be made and take Effect. 2764.

The Words "*Dues and Profits*" (in 10 Ann. c. 11. § 16.) include Surplice-Fees, as well as strict Dues. *Ibid.*

Claim

Of *Conusance*. 2820 to 2826. See *Conusance*.

Commitment.

A Warrant of Commitment *in Execution*, after a *Conviction*, must shew *before whom* the *Conviction* was, and such Person's Authority to convict. 2684 to 2686.

Constable—

Is an Office of *civil Trust*, to which a *naturalized Foreigner* is not eligible. 2787 to 2790.

A Table of the Principal Matters

Contract

Upon the *Survivorship* between two Fathers, One of whom was then actually *dead*, but the *Fact unknown* to the Contractors. 2804, 2805. See *Wager*.

Conveyance.

All the several Parts and Ceremonies necessary to complete a Conveyance shall be taken together ; and operate from the substantial Part, by Relation. 2787. See *Admittance*.

Conusance—

Must be *claimed* in the *first* Instance or at the *first* Day. 2824, 2285. But

1st. None is bound to claim it, *until* he intended by Law to have *some legal Notice* of his Franchise being intrenched upon. *Ibid.*

2dly. In order to *bar* such Claim, some *Laches* or Default in him should be shewn ; and that he *might* have claimed it *sooner* after such Notice as above. *Ibid.*

Coppyholders, and Customary Tenants.

The Difference between them. 2766. *et seq.*

Corporation, Corporators.

No Election, on a *By-Day*, made by *Surprize*, can be valid. 2682.

Where there is a *usual Method of Notice*, such *usual Method* can not be dispensed with, nor an Election good without it ; unless *All* the Persons who have a Right to Notice, are actually summoned, and unanimously agree. *Ibid.*

Costs.

An *Attachment* for Non-payment of them may be moved for on the last Day of a Term. 2686. See *Practice*.

Where a Cause went down to Trial, and went off as a *Remanet*, the Costs always used to attend the *final Event* of a future Trial : But this was confined to the *single Case* of a *Remanet*. Both Courts (B. R. and C. B.) have now extended this to *other* similar Cases. 2694.

Custom.

Contained in this Volume.

Customhouse-Officer.

Seizing Goods not seizable—Trover lies. 2657 to 2659.

Damages

CAN not be severed, where the Count is of a *joint* Trespafs, and the Jury find the Defendants guilty of a *joint* Trespafs. 2792.

In some other Cases, where the Trespafses are joint, the Books differ, whether Damages may be severed or not. *Ibid.*

Devise.

Whether a Person can take as *Heir Male of the Body*, without being also *Heir General*. 2615 to 2628. See *Estate*.

Of “all the Rest and Residue of his *Estate*, whatsoever and “wheresoever, to his Wife, her Heirs, Executors and Administrators”—is a Devise of his *Land* to the Wife, in Fee. The Word “*Estate*” carries every Thing; unless tied down by particular Expressions. 2638, 2639.

Benjamin Bendall, possessed of a TERM for 99 Years, if he or his Daughter *Betty* or *John Bendall* should so long live, devised as follows—“*Item*, I give to my Daughter *Mary*, after the Decease “of my Daughter *Betty*, my House &c. during the Life of “*John Bendall*.” This is a Devise to *Betty* for Life, by Implication. A very strong probable Implication is sufficient: It needs not to be a necessary One. In these Days, a Term may be devised for Life by a Construction of the Intent of the Testator. 2609.

Edward Presgrave devised to his Son *Thomas*, in Fee: But if it should happen that his Wife should be enseint with One or more Children, at the Time of his Decease; and *Thomas* should die without Issue, before 21, such Child or Children being then living; Then (after they should attain 21,) to them, in Fee. But if *Thomas* should die without Issue before 21; or that the Testator's Wife should, at the Time of the Testator's Decease, be enseint with one or more Child or Children who should die without Issue, before 21; Then to several Nephews. The Testator had only One Child, at the Time of making his Will, (*viz.* the said Son *Thomas*.) He had, after making his Will and before his Death, Two other Sons born; *viz.* the Plaintiffs *Edward* and *John*. He died, without altering his Will; leaving these three Sons. *Thomas* died without Issue.

A Table of the Principal Matters

Edward and John are Infants *unprovided for*, unless they take by the Will. The Testator's Wife was *not enseint* at the Time of his Death. The Judges of B. R. certified their Opinion, That the Provision made by the Testator being for Children which were to be born after the making of his Will, He certainly *intended* to comprehend *All* the Children which should be born of his then Wife, (whether *before* or *after* his Decease :) And therefore, notwithstanding the Defect of Expression in this Will, the Children *born before the Testator's Death* are virtually included in the Provision; and will be intitled, (from the Testator's *manifest Intent*,) to take an Estate in Fee, at their respective Ages of twenty-one. 2703 to 2708. *V. supra*, 1570 to 1582.

Jonathan Rudsdell, soon after his Marriage, made a Settlement by Deed-Poll, granting an Annuity out of his Lands, to the Use of his Wife for Life, and afterwards of all his Children by her, Other than an Eldest or only Son, as Tenants in Common. After which Settlement, and when He had *only one Child* (*Susannah*,) he made his Will, whereby he devised to his said Daughter *Susannah*, upon several Contingencies. Some of them depended upon his Wife's surviving him, and being left with Child. One of them was, that if his Wife should *not be left with Child at his Death*, then the *Whole* to his said Daughter *Susannah*, *at her Mother's Death*, if She survives her Mother. AFTER the making of this Will, the Testator had *three more Children* by his said Wife; *viz. Mary, Jonathan, and Benjamin*. The Court of King's Bench certified their Opinion, "That the Testator having left several Children besides his Daughter *Susannah*, the Contingency, upon which the Real Estate or any Part thereof was devised to Her, had not happened; and therefore, that the said Estate descended to his Son *Jonathan*, as Heir at Law, subject to the Annuity of 50*l. per Annum* provided for the younger Children." 2806 to 2812.

Dissenters. See *Meeting-house, Methodists, Mandamus, Statutes* (1 W. & M. St. 1. c. 18.)

Distribution. See *Intestate*.

Distringas.

The Issues may be *sold*, and the Plaintiff's *Costs* paid to him out of the Money, by 10 G. 3. c. 50. 2726, 2727.

These Costs are payable immediately, and at all Events. *Ibid.*

This

Contained in this Volume.

This Act extends to *all* Writs of *Distringas*; and is not confined to such of them only as relate to Privilege of Parliament. 2727.

Ejectment.

THE same *Precision and Exactness* as in a *Præcipe*, is not necessary. Ejectments are, of *later Times*, considered with *more Latitude and Liberality* than formerly; and *more general Descriptions* suffice: For instance—Fifty Acres of *Furze and Heath*, fifty Acres of *Moor and Marsh*, without distinguishing *how much* of each. 2673. *V. supra*, 144. and also 629 to 631.

The Sheriff is to give *Possession*, upon the *Plaintiff's shewing*, and at the *Plaintiff's Peril*. *Ibid. V. ut supra*.

Error.

Bail undertake to pay the Debt and Costs within four Days after *Affirmance* in the Exchequer-Chamber. They affirm the Judgment. But the Defendant below brings a Writ of Error returnable in Parliament. Proceedings shall be further stayed, on Motion, till *final Affirmance*. 2820. See *Bail, Practice*.

Estate—

Archdale Palmer and *John Palmer* convey by *Deed*, to several Uses; Remainder, to the Use of the HEIRS MALE of the Body of the said *Archdale Palmer*. *Archdale* afterwards devised (being then Tenant in Fee-simple) to *W. P.* in Tail Male, and, for want of such Issue, to the HEIRS MALE of his own Body. He left a Grand-Daughter by his Eldest Son; and (by a second Wife) a Son *Henry*. The Question was “Whether any” and *what Estate* passed by the *Deed*, to *Henry*, as *Heir Male* “of the Body of *Archdale*, the Grantor”: And “Whether any” and *what Estate* passed to *Henry* by the *Will*, as *Heir Male* “of the Body of *Archdale*.” 2615 to 2628.

Resolved

1st. *Henry*, by the *Deed*, took BY DESCENT, as *Heir Male* of the Body of *Archdale*, the Grantor. 2627.

2d. In case a *third Person* had been the Grantor, *Henry* would have taken an Estate in Tail Male, by PURCHASE, under the Description of *Heir Male* of the Body of *Archdale*. *Ibid*.

3dly. An Estate in Tail Male passed to *Henry*, as *Heir Male* of *Archdale*, by his *Will*. 2628.

A Table of the Principal Matters

Evidence.

Sheriff's Officer defending under a *Fieri facias* must produce a Copy of the Judgment; where the Action is brought by a Stranger, 2633.

Primâ facie Evidence (if believed) stands good *till* contradicted or repelled by Evidence on the other Side. 2688, 2689.

Evidence of buying a *Libel* in the Shop of a known common Bookseller and Publisher, (especially where it imports to be printed *for* him) is sufficient *primâ facie* Evidence, (if believed and not contradicted,) to convict him of *publishing* it. *Ibid.*

Executor—

Judgment against him *de bonis propriis*—is amendable. 2730, 2731. See *Amendment*.

Fieri facias.

WHERE *Sheriff* or *Sheriff's Officer*, justifying under it, must produce a Copy of the Judgment. 2633. See *Evidence*.

Fishery.

Fisheries are of three Sorts; namely, *several*, *free*, *common*. To constitute a *several* Fishery, it is requisite that the Party claiming it should *so far* have the Right of Fishing independent of all others, as that no Person should have a *co-extensive* Right with him, in the Subject claimed: (For, where any other Person has such *co-extensive* Right, there it is only a *free* Fishery.) But a *partial* independent Right in another Person, or a *limited* Liberty, does *not* derogate from the Right of the general Owner. 2817, 2818.

But the Court did not determine the Question, “Whether a Person can claim a *several* Fishery, without being Owner of the Soil.” *Ibid.*

Heir—

IN, by *Descent*; or in, by Purchase. 2785 to 2787. See *Admittance*.

Highways—

Of *Common Right*, (exclusive of Custom, Prescription, Tenure, &c.,) the *whole* Parish are bound to repair them. If a *particular*

Contained in this Volume.

lar Division of a Parish (which all lies in the same County) be indicted, it will not be sufficient to charge only "that" "they ought immemorially to repair when necessary:" It must appear upon the Face of the Indictment, *how* they are bound, and that they *have* repaired. 2700 to 2702. *V. ante*, 2511, 2512.

Husband of a Ship

Has not power to *insure* it, without particular Directions. 2729, 2730.

Indictment—

A GAINST a *particular Division of a Parish*, for not repairing a *Highway*. 2700 to 2702. See *Highways*.

Information in Nature of a *Quo Warranto*.

A Charter constitutes a Mayor and eleven Chief Burgeses; and directs the Mode of electing a Mayor thus—"Quod Major et "Undecim Capitalium Burgensium pro tempore existen', vel "major Pars EORUM, should meet annually on St. Matthew's "Day &c, and continue together quousque ipsi vel EORUM "major Pars ibidem adtunc assemblat' eligerent et nominaverint "unum Majorem, de semetipsis, pro Anno sequen'." *John Leigh* was elected Mayor, at a Meeting of only four Chief Burgeses, namely the then Mayor and three other Chief Burgeses; at which time the whole Number of subsisting Burgeses was eleven. During the Mayoralty of *John Leigh*, so elected, *Grimes* was chosen a Chief Burgess, without Notice to the Electors; None of whom resided within the Burrough. An Information was brought against *Leigh*, for acting as Mayor; and Judgment against him. The present Information was brought against *Grimes*, for acting as Chief Burgess: And a Special Verdict found all the above Facts. Resolved unanimously,

1st. It was not necessary to summon *Grimes's* Electors, who did not reside within the Burrough. 2601.

2dly. The Verdict and Judgment against *Leigh*, the Mayor, under whom *Grimes* was elected Chief Burgess, is admissible Evidence upon this Information against *Grimes*; but not conclusive. *Ibid.*

3dly. Upon the Construction of this Charter, thus directing the Mode of electing a Mayor, the Meeting ought to consist

A Table of the Principal Matters

consist of a *Majority* of the *whole Number* of subsisting Chief Burgeses: Consequently, *Leigh's* Election at a Meeting of a *minor* Part of the *Eleven* subsisting Burgeses, was *not* pursuant to the Directions of the Charter. *Ibid.*

Insurance.

The *Husband of a Ship* has no Authority to insure it; without particular Directions. 2729, 2730.

Joint Tenants.

The *Possession* of One Joint-tenant is the Possession of the Other, so far as to prevent the *Statute of Limitations*: Which can not run against a Man, but where he is *actually* seised or ousted. One Tenant in Common can not disseise Another by bare Perception of Profits only: It must be done by *actual* Disseisin. Perception of Profits does not amount to an Expulsion. 2604 to 2608.

Judgment—

Entered up by an Attorney's Clerk, who used the Name of a regular Attorney but *without his Knowledge or Consent*—was set aside. 2660.

Against an Executor, *de bonis propriis*, is amendable. 2730, 2731. See *Amendment*.

King's Counsel &c.

MEssrs. *Gryffyth Price, Perryn and Skynner*, made King's Counsel; Mr. *Thurlow*, Attorney General; Mr. *Wedderburne* Solicitor General; Mr. *Nares*, a Judge of C. B.; Mr. *De Grey*, Ld. Ch. J. C. B. (vice Sir *J. E. Wilmot*, who resigned;) and Mr. *Bathurst*, Lord Chancellor, and a Peer. 2692.

Landlord. See Rent, Tenant, Statutes.

DDOUBLE the yearly Value is payable by the Holder over, after Demand and Notice in Writing given for delivering Possession, pursuant to 4 G. 2. c. 28. s. 1. 2698. *V. supra*, 1607 to 1609.

1st. A Receiver is an Agent. *Ibid.* See Rent.

2

2d. such

Contained in this Volume.

- 2d. Such Notice is a *Demand*. *Ibid.* See *Rent*.
3dly. This is a Remedial Law. *Ibid.*

Latitat—

Must bear *Teste* within Term: But it may be averred as a Fact,
“That it was *prosecuted* in *Vacation* Time.” 2588. *Vide*
Pleading.

Letters.

Resolved in B. R. That if the Persons to whom Letters are
addressed, reside *within the established Limits* of the Post Town,
the Post-Masters are *obliged to deliver* their Letters at their
Places of Abode. 2712 to 2716. *Vide supra*, 2149 to
2153.

Libel, Libellous.

Upon an Information for *Printing and Publishing* a seditious Libel,
the Jury found the Defendant *Guilty* of the *Printing and Pub-*
lishing ONLY. A *Venire facias de novo*, was ordered. 2661.

1st. There may be Cases where the Fact proved as a Publication
may be justified or excused. 2666.

2dly. The Jury are to consider, “Whether all the *Innuendos*,
“and all the *Applications* to Matter and Persons made by the
“Information, were, *in their Judgment*, the *true* MEANING
“of the Paper.” If they think otherwise, they ought to
acquit the Defendant: But if their Judgment agrees with
the Information, and they believe the Evidence as to the
Publication, they ought to find him guilty. *Ibid.*

3dly. It is not their Province, to find, “Whether the Paper
“is a *Libel*; or Whether it is a Libel to such a Degree as
“to *deserve the Epithets* given to it by the Information;”
“or to require *Proof of the express Intent* of the Defendant in
“Printing and Publishing, and of its being *malicious* to
“such a Degree as to deserve the Epithets given to it by
“the Information.” *Ibid.*

4thly. Whether the Paper, *meaning as alledged* by the Infor-
mation, *be*, in Law, “a *Libel*,” is a Question of Law, upon
the Face of the Record. *Ibid.*

5thly. All the *Epithets* in the Information are *formal Infer-*
ences of Law, from the Printing and Publishing. *Ibid.*

6thly. No Proof of *express Malice* was ever required. *Ibid.*

7thly. The Verdict should find only what the Law *infers* from
the Fact. *Ibid.* And therefore, after Conviction, the Defend-
ant may, by Affidavit, lessen the Degree of his Guilt. *Ibid.*

A Table of the Principal Matters

8thly. Where an Act *in itself indifferent*, by being done with a criminal Intent, *becomes criminal*, the Intent must be *proved and found*: But where the Act is in itself *unlawful*, the Proof of *Justification* or *Excuse* lies on the *Defendant*; and, in Failure thereof, the *Law implies a criminal Intent*. 2667.

9thly. Where there is a Doubt, upon the Judge's Report, as to what passed at the Time of bringing in the Verdict; there the *Affidavits of Jurors or By-Standers* may be *received*, upon a Motion for a New Trial, or to rectify a Mistake in the Minutes: But an *Affidavit of a Juror* can never be read, *as to what he then thought or intended*. *Ibid.*

10thly. The *technical Omission of the Clerks* ought to be *set right*: But the Word "*only*" must *stand* in the Verdict. *Ibid.*

Publication of it—Buying it in the *Shop* of a known common Bookseller and Publisher, (especially if it professes to be printed for him,) is sufficient *prima facie* Evidence to convict him of its being published by *Him*; and (if believed) stands good, till contradicted or repelled. 2687 to 2690. See *Evidence*.

Limitation

Of Ejectments.—The Statute of Limitations never runs against a Man, but where he is *actually ousted or disseised*. The Possession of one *Joint-tenant* or *Tenant in Common* is the Possession of the Other, so far as to prevent the Statute of Limitations. 2604, 2605.

Of Estates—"To the Use of the *Heirs* of *W. C.* on the Body of *S.* lawfully begotten or to be begotten; the MALE *to be preferred before the FEMALE*, and the Elder before the Younger;" is an Estate in *Tail Male*. 2611.

Of Actions. A *Petitioning Creditor's* Debt was above six Years standing. 2630. See *Bankrupt*.

Mandamus.

TO the *College of Physicians*, to admit a *London Licentiate* into "their Fellowship. 2740 to 2761. See *Physicians*.

Mandalaughter.

Special Verdict on *John Taylor*, for the Death of *James Smith*, 2794, 2795. If the Defendant has *had his Clergy*, it is a good Bar to an Appeal. 2801.

Contained in this Volume.

Naturalized Foreigner

IS not eligible to the Office of Constable. 2738 to 2790.

Non-Suit

Refused to be *set aside*, and Leave to *reply de novo*. The Plaintiff's former Replication was, "That the Cause of Action arose within six Years:" Which he could not prove. He wanted now to reply, "That the Writ of Latitat issued within the six Years." 2692, 2693.

Notice

Of Refusal to accept a Bill of Exchange. 2672. See Bill of Exchange.

Orders.

AN Order of Sessions quashing a *Poor-Rate*, was itself quashed, because it quashed the Rate *only* for not assessing Manufacturers and Traders for their *Stock in Trade*, but did not proceed to relieve the Persons supposed to be injured, or to charge the Persons omitted; and also because it proposed a *general Question* to the Court, without stating particular Facts. 2637. Vide *Poor-Tax, Rates*.

Parish-Officers—

WHether they are obliged to relieve Poor who refuse to go into the *Workhouse*. 2679.

Partners—

Action brought against *One alone* where there are several. 2613.
See *Action, Pleading*.

Payment of Money into Court. (See *Practice*.)

Is an *Acknowledgment* of being liable to the Action. 2640.

Why—

A Table of the Principal Matters

Physicians.

A *London Licentiate*, who has accepted a *Licence* under the *By-Law* of 4th April 1737, ought not afterwards to desert that Claim, and treat the *By-Law* as null and void; and yet, upon the Foundation of that very same *By-Law*, set up a Claim "to be admitted a Fellow," under the *Charter*. 2759 to 2761. But it was not directly determined, "Whether such *Licentiate*s have, in general, "a Right to demand Admission into the "College, or not." *Ibid*.

Pilots.

The Fellowship of Pilots of the *Trinity-House* of *Dover*, *Deal*, and the Isle of *Thanet*, have the sole Piloting and Load-Management of all Ships and Vessels, from those Places, up the *Thames* and *Medway*: And by 3 *Geo. 1. c. 13*. Every Person, even the *Master* of the Ship or Vessel himself, who takes upon himself to do so, before being first *examined*, approved, and *admitted* into that Society, incurs the *Penalties* of that Act of Parliament. 2602 to 2604.

Plea—

In *Abatement*—By One of several Partners, sued alone, without joining the Rest. 2613 to 2615. See *Action*, *Pleading*.

Pleading—

It may be alledged as a Fact, "That a *Latitat* was prosecuted in *Vacation*-time: But if it bears *Teste* out of Term, it is void. 2589. *V. supra*, under P. 950 to 969.

Action brought against one Partner alone, upon a *Partnership-Account*.—It can not be given in *Evidence*, "that there are several Partners:" It must be pleaded in *Abatement*. The Omitting to plead it in *Abatement* is a *Waver* of the Objection. 2612 to 2614.

On a *Joint Bond*, and Action brought against one *Obligor* alone, it may be moved in Arrest of Judgment, if it appears upon the Face of the Declaration: Otherwise it must be averred. *Ibid*.

The Court refused to set aside a *Nonsuit*, and give Leave to *reply de novo*, where it put the Issue upon quite another Foot, which the Plaintiff had before pretermitted. 2692, 2693.

Contained in this Volume.

Policy of Insurance.

The Insured ought to know whether his Ship was *Sea-worthy*, when She *set out* upon her Voyage: But he can not be expected to know her Condition, after She has been long out. 2804.

Poor—

Whether Parish-Officers are obliged to relieve such as refuse to go into the Work-house. 2679.

Poor-tax. See *Orders, Statutes* (43 *El. c. 2. § 1.*)

“Whether a Tradesman is rateable for his Stock in Trade”—was not now determined: But it seems, not. 2636, 2637. *V. supra.* 2291.

Post-Master. See *Letters.*

Practice. See *Process, Proceedings, Declaration, Pleading, Repleader.*

Where a Matter must be *pleaded in Abatement*, but can not be given in Evidence; or may or may not be moved in *Arrest of Judgment.* 2611 to 2615. See *Action, Bond, Partners.*

Payment of Money into Court is an Acknowledgment of being liable to the Action. 2640.

The *Form and Method of Proceeding* upon an *Appeal of Death.* 2643 to 2657.

A *Judgment* signed by an Attorney's Clerk who used the Name of a regular Attorney, but *without his Knowledge or Consent*—was set aside. 2660.

An *Attachment* for Non-payment of *Costs* may be moved for, on the last Day of a Term. 2686.

If Proceedings against Bail are stayed, upon their undertaking to pay the Debt and Costs, within 4 Days after the *Affirmance* of a Judgment, it means the *final Affirmance* of it. See *Bail, Error.*

Claim of Conusance. See *Conusance*

Privilege

Of Parliament. 2726, 2727. See *Distringas, and Statutes*, 10 *G. 3. c. 50.*

VOL. V.

3 Z

Purser

A Table of the Principal Matters

Purser of a Man of War—

Whether saleable, or not. 2700. See *Words*.

Quo Warranto. See *Information in Nature of a Quo Warranto*.

Rates.

STOCK in Trade, “Whether rateable to the *Poor*, or not,” was not determined, (because the Sessions proposed a general Question to the Court, without stating a particular Case &c :) But the Court inclined that it is not. 2637. See *Orders*.

Remanet—

The general Rule, “that if a Cause goes off as a Remanet, the *Costs* shall attend “the final Trial,” is now extended (both by *B. R.* and *C. B.*) to other similar Cases. 2694.

Rent—

Double the yearly Value, on holding over, after *Demand* made and *Notice* in Writing given for delivering the Possession, by the Landlord &c. or his Agent or Agents thereunto lawfully authorized; pursuant to 4 G. 2. c. 28. § 1. 2698.

1st. A *Receiver* appointed by Chancery is such an *Agent* lawfully authorized to give such Notice. *Ibid*.

2dly. Such *Notice* is a *Demand*: There is no Occasion to make a *distinct Demand*, over and above the Notice in Writing. *Ibid*.

3dly. This is a *remedial Law*. *Ibid*.

Rescue.

A Rescue is no Excuse for a Gaol-keeper, bringing up a Prisoner by *Habeas Corpus*, and charged with a wilful and voluntary Escape. 2814.

Residence—

At in and upon a Parsonage or Dignity. 2722 to 2725. See Statutes (21 H. 8. c. 13. § 26.)

Contained in this Volume.

Roads. See *High-ways*

Security for Costs. See *Costs, Practice.*

Sheriffs and their Bailiffs

JUSTIFYING under a *Fieri facias*—Where they must produce a *Copy of the Judgment.* 2633. See *Evidence.*

Ship. See *Policy, Insurance.*

Piloting Ships or Vessels from Dover, Deal, and the Isle of Thanet, up the Thames and Medway. 2603, 2604. See *Pilots.*
Insuring it. 2729, 2730. See *Husband.*

Stamps.

1 *Ann. Stat. 2. c. 22. § 2.* The Duty is payable, upon a Letter of Attorney made in England, to collect Debts in *Newfoundland*: And the Penalty is incurred by erasing Names and Date, without re-stamping. 2673 to 2677.

Statutes.

3 *G. 1. c. 13.* 2604. See *Pilots.*

21 *J. 1. c. 16. § 3.* Of Limitations—The petitioning Creditor's Debt, above six Years standing. 2630. See *Bankrupt.*

13, 14 *C. 2. c. 11. § 6.* Persons forcibly hindering, resisting, affronting, abusing, beating, or wounding *Customhouse Officers* in the Execution of their Office, shall be committed to Prison, there to REMAIN till the next *Quarter-Sessions*—They are not bailable, as of Right. 2642.

1 *Ann. Stat. 2. c. 22. § 2.* Letter of Attorney made in England, to collect Debts in *Newfoundland*, erased in Names and Date; and Both altered, without re-stamping. 2676, 2677. See *Stamps.*

4 *G. 2. c. 28 § 1.* concerning double Rent. 2698. See *Landlord, Tenant, Rent.*

21 *H. 8. c. 13. § 26.* enacts, that every spiritual Person promoted to a Dignity or Benefice with a Parsonage or Vicarage, shall be personally resident in at and upon his Dignity or Benefice or One of them: And if he absents himself wilfully, One Month together, or Two Months in all, in any One Year, he

A Table of the Principal Matters

he shall forfeit 10*l*; Half, to the King; Half, to the Prosecutor. Resolved—

1st. If there be a Parsonage he must reside *in it*: His Residing in any *other* House, though it be in the Parish, is not sufficient. 2724, 2725.

2dly. If there be no Parsonage-house, he must reside somewhere *within* the Parish. *Ibid*.

3dly. There being no House belonging to the Dignity is no Excuse for not residing in the House belonging to the Parsonage. *Ibid*.

10 G. 3. c. 50. "For the further preventing Delays of Justice, "by reason of Privilege of Parliament. 2725, 2726. See *Distingas*.

3 Edw. 1. (*Westm. 1.*) c. 4. discussed and interpreted. 2732 to 2739. See *Wreck*.

10 Ann. c. 11. s. 16. 2762 to 2764. See *Churches* (New.)

12, 13 W. 3. c. 2. } 2787 to 2790. See *Constable*, Naturalized
1 G. 1. c. 4. } Foreigner.

Surrender—

Of a Copyhold, or Customary Tenancy, does not make a *complete* Title, till *Admission*: But after *Admission*, it shall operate from the *Date of the Surrender*. 2785 to 2787. See *Admittance*.

Tail.

WHERE a Person may take as *Heir MALE of the Body*, without being *Heir General*. 2628. See *Estate*.

Term.

A Term may (in these Days) be *devised for Life*, by a Construction of the Intent of the Testator. 2609. *v. supra*, 285, 286. *v. Devise*.

Trove

Lies against a *Custom-house Officer* for seizing and carrying to the King's Warehouse, Goods not seizable. 2659.

Will not lie against a *Wharfinger*, nor against a *Common Carrier*, for Goods *stolen*, or *lost*: It must be an Action upon the Case. 2826, 2827.

In order to maintain *Trove*, there must be an *INJURIOUS Conversion*. *Ibid*.

Uerdia

Contained in this Volume.

Verdict,

Upon an Information for printing and publishing a *Libel*, found the Defendant guilty of the *Printing and Publishing* ONLY. Two Cross Motions were made: One "to stay entering up the Judgment:" the other, "That the Verdict might be entered according to the legal Import of the Finding." Many Points were resolved: (Which see abridged under "Article "*Libel*."") 2664 to 2670.

Wager.

MR. Codrington and Mr. Pigot, two Heirs apparent, being at *New Market*, agreed to *run their Fathers*, Each against the Other's Life. The Chances were to be computed by Lord *Of-fory*, according to their Ages. Mr. Codrington's Father was a little turned of Fifty: Mr. Pigot's, upwards of Seventy. Lord *March* afterwards agreed to stand in Mr. Codrington's Place. Reciprocal Notes were given, but not worded alike. Mr. Pigot's runs thus—"I promise to pay to the Earl of *March*, 500 Guineas, if my Father DIES before Sir William Codrington." The Earl of *March*'s run thus—"I promise to pay to Mr. Pigot 1600 Guineas, in case Sir William Codrington does not survive Mr. Pigot's Father." These Notes were given at *Newmarket*, after Dinner. No Mention was at all made, at the Time of the Transaction, about their Fathers being then dead or alive. But, in Fact, Mr. Pigot's Father was then dead: He died at two o'Clock in the Morning of that same Day, in *Shropshire*, 150 Miles from *London*. This Fact was totally unknown to the Parties at *Newmarket*; Nor was there any Reason to suspect that Mr. Pigot's Father was then dead. At the Trial, no Objection was made against going into parol Evidence. Lord *Mansfield*, who tried the Cause, left the Matter to the Jury. They found for the Plaintiff, with 525 *l.* Damages. A new Trial was moved for. The Objection was, that the Contract was void: It was without Consideration. It was a Contract *in futuro*. The Defendant could not possibly win: Therefore he ought not to lose. But the Court thought the Jury to be the proper Judges of the Intention of the Wager; and refused to grant a New Trial. 2805.

A Table of the Principal Matters, &c.

Wharfinger—

Not distinguishable from a *Common Carrier*, as to Goods delivered. 2826, 2827. See *Trover*.

Witnesses.

A Person liable to be *contributory* to the Defendant for the Damages recovered is *incompetent* to be a Witness for him. 2729, 2730.

Words.

- “ Mr. Purdy gave 200 l. for his *Warrant to be Purser* of the
“ *Magnanime* (a Man of War.)
1st. If given to the *Commissioners of the Admiralty*, it would be criminal in both Giver and Taker. 2699, 2700.
2d. Judgment was arrested, because this Charge did not import any Crime or Defamation, as it did not specify to whom the Money was given. *Ibid*.

Wreck.

There is no Ground for the Distinction, that the Goods are forfeited, because no *live Animal* escaped. Though this is one Medium of Proof of Ownership, yet *other Proof* may be brought; particularly the *Marks* upon the Goods: Provided it be within a limited Time. 2738.

The Statute of *W. 1. (3 E. 3.) c. 4.* was declaratory of the Common Law. *Ibid*.

The above Statute fully discussed and interpreted. 2735 to 2739.

Writ.

A Writ may be *prosecuted in Vacation-time*, and alledged to be so; though all Writs must bear *Teste* within Term. 2588.



